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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXIX.

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AMERICAN STATE REPORTS.

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VOL XXIX

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

GIBSON v. HERRIOTT.

[55 ARKANSAS, 85.]

EXECUTORS AND ADMINISTRATORS — PURCHASE BY — AVOIDANCE BY HEIRS — LACHES. — Where an administrator becomes interested, by purchase, in the land of the estate, after his sale thereof, but before its confirmation, the sale may be set aside by the heirs within a reasonable time, without proof of actual fraud or injury. This right may be lost by acquiescence or laches.

LACHES — WHAT CONSTITUTES — DISCRETION OF COURT. — What delay in bringing suit will constitute such laches as will bar relief, in the absence of the defense of the statute of limitations by plea or demurrer, depends upon the facts and circumstances of each particular case, and is within the sound discretion of the court to determine.

LACHES BY HOLDER OF EQUITABLE TITLE. — The delay of a party holding the equitable title to land, in standing by and permitting the owner of the legal title to expend large sums in improving and developing the property until it has largely increased in value, without notice of his claim, will constitute such laches as will bar relief.

LACHES BY HEIRS — PURCHASE BY ADMINISTRATOR. — When an administrator has become interested, by purchase, in land of the estate, after its sale by him, but before its confirmation, an unexplained delay of seven years by adult heirs in permitting such administrator to pay the debts of the estate and to permanently improve the property purchased, until it has greatly increased in value, without notice of their claim, is such laches as will bar their right to avoid such sale, although the statute of limitations is not interposed by plea or demurrer.

MARRIED WOMAN, LACHES OF. — Laches is imputable to a married woman in respect to her separate property.

LACHES OF INFANT. — An infant cannot be charged with his own laches, but when time has commenced to run against his ancestor, it continues to run against the minor heir.

EVIDENCE. — A SWORN PLEADING of a party to one action is admissible in evidence against him in another action as an admission, subject to rebuttal and explanation.

LACHES OF ADULT HEIRS — PURCHASE BY ADMINISTRATOR. — Where an administratrix purchases all the lands of the estate, including her dower therein, as an entire transaction at her own sale, and then makes valuable improvements on the entire estate claimed by her by virtue of her dower and her purchase, the sale, though voidable, will not be set aside at the instance of adult heirs, after such unreasonable delay by them as to constitute laches.

EXECUTORS AND ADMINISTRATORS — FRAUDULENT PURCHASE BY ADMINISTRATOR, SETTING ASIDE — COMPENSATION. — Where an administratrix purchases the lands of the estate, including her dower therein, at her own sale, and the sale is set aside as to infant heirs for constructive fraud after the administratrix has made valuable improvements, she is entitled to compensation for the full value of her improvements, less rents, and to have the purchase-money and taxes paid by her refunded, with interest, as to all of the land except her dower, and as to that she is entitled to have the purchase-money only refunded.

W. P. and A. B. Grace, for the appellants.

Thomas J. Ormsby, M. L. Bell, and Thomas B. Martin, for the appellee.

BATTLE, J. Solomon Walton died on the 4th of November, 1876, in Jefferson County, in this state, intestate, leaving Belle Herriott, Rosa E. Lindsay, Kate Hinton, and Sallie E. Whitley, who were his children, his only heirs him surviving. He was, at the time of his death, a married man, and left his wife, M. A. Walton, who is now the wife of John W. Gibson, surviving. At his death he was the owner of personal property and about 860 acres of land, of which 265 acres were cleared and in cultivation, and was much in debt. Shortly after his death, Mrs. Walton administered on his estate; and some time thereafter, dower in his land was set apart and assigned to his widow. His personalty not being sufficient to pay his debts, his administratrix applied to the Jefferson probate court for an order to sell the lands which had not been assigned as dower, and the reversion in the other, to pay the debts remaining unpaid. The probate court granted the application at its July term, 1879, and authorized and directed the administratrix to sell all the lands, including the reversion in the land assigned to the widow, as dower. On the 24th of September, 1879, the land which had not been assigned to the widow was sold at public auction to E. W. Martin and F. J. Wise at and for the sum of \$2,800, they being the highest bidders therefor, and the other land was sold to Frank Tomlinson, subject to the dower, for \$750, no one offering more for it. Martin and Wise, not being able to comply with the terms of the sale,

induced Louis and Joseph Altheimer to take their bid. Before they did so, they purchased from Tomlinson the right, claim, and interest acquired by him at the sale, and procured from him an assignment of his bid. They (the Altheimers) having complied with the terms of the sale, the administratrix, on the 27th of September, 1879, conveyed to them the said lands and reversion, reserving a lien for the unpaid purchase-money. Attempting and failing to purchase of the widow her interest in the lands set apart to her as dower, they proposed to sell to her the lands and reversion in lands conveyed to them. Persuaded by her friends to accept this proposition, she purchased the land and reversion on a credit of four years, agreeing to pay one thousand dollars more for it than the sum for which she sold it. In pursuance of their agreement, the Altheimers, on the 30th of September, 1879, conveyed to her the lands, including the reversion. Afterwards, on the 15th of October, 1879, the administratrix made a written report of the sale of the land, including the land assigned as dower, made by her, as evidenced by her conveyance to the Altheimers, to the probate court, which, on the same day, approved the sale; and with the proceeds of the sale so approved, the administratrix paid the said debts of her intestate.

At the death of Solomon Walton, the land was in bad condition; the houses were dilapidated,—only a few of them were fit for use. The fences on it were not sufficient to protect the crops which were thereafter grown on it against the trespasses of cattle. There were 265 acres cleared and prepared for cultivation. The annual rental value of the land was eight hundred or one thousand dollars. The widow attempted to rent it for eight hundred dollars, but failed. After she purchased it from the Altheimers, she cleared 230 acres of it, twenty or thirty acres of which were on the land which was set apart to her as dower; built fifteen tenant-houses on the land; dug eight or ten wells; put a new fence around the cleared land as often as twice, one and a quarter miles of which was a wire fence; erected on the land a large barn, a new gin-house, saw and grist mills, and cotton-press; put in the gin-house a new cotton-gin; attached to the saw and grist mills and cotton-gin new steam machinery, so as to operate them by steam; and expended a large sum of money in improving the land. The annual rental value of the land, after these improvements were made, has been and is two thousand five hundred dollars.

After this, on the thirteenth day of July, 1887, Belle Herriott, Rosa E. Lindsay, Kate Hinton, and their husbands, and William M. and Daniel E. Whitley, minors, the heirs of Sallie E. Whitley, who is dead; by their next friend, brought this action in the Jefferson circuit court against M. A. Gibson and her husband. They alleged in their complaint that the sale to the Altheimers and the conveyance by them to the widow were fraudulent, and asked that the deed executed by the administratrix, as before stated, be canceled, and that Mrs. Gibson be declared to be a trustee holding all the land, except her life estate therein, which was her dower, in trust for them. The defendants answered, but did not plead the statute of limitations. The circuit court held that the sale made by the administratrix on the 24th of September and the conveyance by the Altheimers to the widow on the 30th of September were fraudulent, because she was under a disability to purchase until the sale was confirmed, and that she held the land, including the reversion in the land set apart as dower, in trust for the plaintiffs, and decreed accordingly. Did the circuit court err?

As a rule, no one occupying a relation of trust or confidence to another is permitted to purchase property for himself when he has, by reason of such relation, a duty to perform in respect to it which is inconsistent with the character of a purchaser, or to do any other act which has a tendency to interfere with the faithful discharge of such duty.

It matters not how fair, profitable, or advantageous the purchase may be to the *cestui que trust*, courts of equity will set it aside upon the application of the *cestui que trust*. The object of the rule is to protect the *cestui que trust* against fraud and injustice, and to remove from persons holding such relations all inducements and temptations to speculate upon or control, for their own benefit, property held by them in trust or confidence. This rule applies to executors and administrators, and in this state has been extended to an attorney of an administrator who prepared and filed the petition of the administrator, and obtained the order for the sale of property of the deceased: *West v. Waddill*, 33 Ark. 575; *Hindman v. O'Connor*, 54 Ark. 627.

The rule is clearly applicable to this case. At the time Mrs. Walton purchased, the sale made by her in her fiduciary capacity was incomplete, and she was the owner of all the interest, if any, acquired by it; and the question was, Should the

sale by the administratrix, which involved her own purchase, be approved by the probate court? If it was disapproved, she took nothing by her purchase from the Altheimers. Under these circumstances, she, as administratrix, reported the sale made by her to the probate court for confirmation. It was then her duty to give to the court all the information in her possession which would have better enabled it to decide whether it was to the advantage of all parties concerned that the sale be approved, and to resist the confirmation of it if it had been unfairly conducted, or its approval involved an unnecessary sacrifice to the estate of her intestate. It is obvious that her duties as administratrix at the time she purchased were inconsistent with the character of a purchaser. The heirs of the deceased could therefore have had the sale set aside without showing actual fraud or injury: *Livingston v. Cochran*, 83 Ark. 294; *Terwilliger v. Brown*, 44 N. Y. 237.

But the sale was not void, but voidable by the persons interested in the estate of Walton. To avoid it, they must have made application to set it aside within a reasonable time. This right could have been lost through acquiescence or laches. Was it lost?

Courts of equity have always discouraged laches and delay. The door of equity cannot forever remain open. In *Smith v. Clay*, 3 Brown Ch. 640, note, Lord Camden, delivering the opinion of the court, truly said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court": *Wagner v. Baird*, 7 How. 234; *Bowman v. Wathen*, 1 How. 189.

But courts of equity have established no guide or rule by which it can be determined, in all cases, what will constitute such laches as will be a bar to relief. As to what delay in bringing suit, in the absence of a demurrer or a plea of the statute of limitations, as in this case, will constitute a bar, depends upon the particular facts and circumstances of each case. "Sometimes the analogy of the statute of limitations is applied; . . . in some cases a shorter time is sufficient;

and sometimes the rule is applied where there is no statutable bar." Whether the time the negligence has subsisted is sufficient to make it effectual as a bar, is a question to be resolved by the sound discretion of the court: *Wilson v. Anthony*, 19 Ark. 16; *Sullivan v. Portland etc. R. R. Co.*, 94 U. S. 806; *Hanson v. Worthington*, 12 Md. 418; *Castner v. Walrod*, 83 Ill. 171; 25 Am. Rep. 369; *Akins v. Hill*, 7 Ga. 573; *Spaulding v. Farwell*, 70 Me. 17; *Hayward v. National Bank*, 96 U. S. 611; *Phillips v. Rogers*, 12 Met. 405; Perry on Trusts, secs. 229, 230.

A delay of a party holding an equitable right to property which has permitted another, who holds the legal title, to expend large sums of money in the improvement of the property, and thereby greatly enhance it in value, which he would not have done had the right been promptly asserted, has usually been considered such laches as will preclude the party guilty of it from relief. If the party holding the equitable right would avail himself of it, he must assert it in a reasonable time. Equity will not permit him to stand by and permit the other party, who holds the legal title, to improve and develop the property until it has become valuable or greatly increased in value, and then enforce his right; nor to wait until the future decides whether the property will increase or decrease in value, and then elect to take it if it increases. He is not permitted to experiment or speculate in this way at the risk or expense of another: *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Royal Bank of Liverpool v. Grand Junction R. R. etc. Co.*, 125 Mass. 490; *Harkness v. Underhill*, 1 Black, 316; *Hollingsworth v. Fry*, 4 Dall. 345; *Cox v. Montgomery*, 36 Ill. 398; *Bliss v. Prichard*, 67 Mo. 181; *Smith v. Washington*, 11 Mo. App. 525; *Castner v. Walrod*, 83 Ill. 171; 25 Am. Rep. 369.

In this case, the plaintiffs permitted Mrs. Walton, without any notice, so far as the evidence discloses, that they claimed the right they now assert, to make lasting and permanent improvements upon the land; to expend large sums of money in making the improvements; to improve and develop the land until it was greatly increased in value. (The annual rental value of the land at the time of her purchase was about eight hundred or one thousand dollars. It increased to two thousand five hundred dollars. Evidently, the value of the land was greatly increased.) They permitted her to pay off the debts of the estate of their deceased ancestor. And after she had improved the lands, spent large sums of money, the lands had greatly increased in value, the debts of the estate

had been paid, and after about seven years had expired, they brought this action to set aside her purchase. To permit them to do so would be inequitable and unjust. They have not instituted their suit within a reasonable time. Their laches precludes them from relief, unless they can show a reasonable excuse for their delay.

The party, says the supreme court of the United States in *Badger v. Badger*, 2 Wall. 95, who appeals to the conscience of the chancellor in support of a claim, when there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer": *Marsh v. Whitmore*, 21 Wall. 178; *McGaughey v. Brown*, 46 Ark. 25. So in *Sullivan v. Portland etc. R. R. Co.*, 94 U. S. 806, 811, the same court said: "To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief": *Richards v. Mackall*, 124 U. S. 183; *Wilson v. Anthony*, 19 Ark. 16.

Plaintiffs have shown no impediment to an earlier prosecution of their claim, or ignorance of their rights or the facts, nor have they shown any excuse for their delay further than has already been stated. It appears that one or more of them were married women at the time Mrs. Walton purchased, and have remained so. Can laches be imputed to them?

At common law, while a married woman remained under the disability of coverture, she could not be guilty of laches. In equity, she is considered in all respects as a *feme sole* in respect to property settled to her sole and separate use. Under the constitution of this state, her real and personal property, acquired in any manner, are and remain her separate estate and property so long as she may choose, and can be devised, bequeathed, or conveyed by her the same as if she were a *feme*

sole, and are not subject to the debts of her husband. Under our statutes, property owned by her at the time of her marriage, or acquired by her afterwards, is and remains her sole and separate property, and can be used by her in her own name, and is not subject to the interference or control of her husband. She can bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account; and her earnings from her trade, business, labor, or services are her sole and separate property, and can be used or invested by her in her own name. No bargain or contract made by her in respect to her separate property, or in or about her trade or business, under the statutes of this state, is binding upon her husband, or renders him or his property in any way liable therefor. She can be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her, and can maintain an action in her own name for or on account of her sole or separate estate or property, business or services, or for damages against any person or body corporate for any injury to her person, character, or property. In an action brought or defended by her in her name, her husband or his property is not liable for the costs thereof or the recovery therein. Whenever judgment is recovered against her, it can be enforced against her sole and separate property to the same extent and in the same manner as if she were sole. The statutes clothe her with the same property rights, and, with few exceptions, subject her to the same liabilities as her husband. She can manage her own property and bind herself by contract, with the exception of contracts to convey land, in respect to her property, separate trade, or business, as fully and to the same extent as he can. Vested with the rights of property and the right to sue and be sued possessed by her husband, she is subject to the same rules which restrict and control his rights. For this reason, it has been held by this court that she is barred by the statute of limitations which prescribes the time within which actions to recover land sold at judicial sales shall be commenced. For the same reason she can be guilty of laches. The disabilities of coverture in respect to her separate property having been removed, she is to the same extent relieved of its consequences: *Steines v. Manhattan Life Ins. Co.*, 34 Fed. Rep. 441, 444; *Burkle v. Levy*, 70 Cal. 250, 254; *Morrow v. Goudchaux*, 41 La. Ann. 711; *Lewis v. Barber*, 21 Ill. App. 638, 641.

As an infant is not *sui juris*, laches cannot be imputed to him during the continuance of his minority. But, following the analogy of the statute of limitations, it has been held that where time has commenced to run against the ancestor, it still continues to run against the minor heir: *Williams v. First Presb. Society*, 1 Ohio St. 478; *Henry v. Conn*, 12 Ohio, 193; *Wilson v. Harper*, 25 W. Va. 179. Has it run against the minors in this action?

In this case all the heirs were adults at the time of the death of their ancestor. But since that time one of them, Sallie E. Whitley, has died, leaving William M. and Daniel R. Whitley, who are minors, her only heirs. It is averred in the complaint, and admitted in the answer, that they were minors at the commencement of this action. But it nowhere appears when Sallie E. Whitley died. But it does appear in the petition of Mrs. Walton to the Jefferson probate court for dower in the estate of Solomon Walton, deceased, that she was dead when it was filed, and it was filed before the land belonging to Walton's estate was sold by his administratrix. The petition was verified by Mrs. Walton, and was admissible as evidence in this action in the nature of an admission that Mrs. Whitley was dead at the time it was filed in court, subject to rebuttal and explanation: *Parsons v. Copeland*, 33 Me. 370; 54 Am. Dec. 628; *Bliss v. Nichols*, 12 Allen, 445; Wharton on Evidence, 3d ed., sec. 838. So it appears that laches is not imputable to the minor heirs in this action.

Does the fact that Mrs. Walton had a subsisting life estate in the land assigned to her as dower at and since the time of her purchase affect the right of the adult heirs to have the sale of the reversion in the lands so assigned set aside? We think not. The purchase of Mrs. Walton was one entire transaction. All the lands, including the reversion, were conveyed by the administratrix by the same deed to the Altheimers, and in the same way were conveyed by them to Mrs. Walton. The confirmation by the court of the sale to the Altheimers was one order. The improvements made on the land by Mrs. Walton were referable to the entire interest and estate which she claimed by virtue of dower and her purchase: *Fee v. Cowdry*, 45 Ark. 410; 55 Am. Rep. 560. The presumption is, she would not have made all of them if the plaintiffs had promptly asserted their rights. If they had, within a reasonable time, applied to a court of equity having jurisdiction to set any part of the sale aside, their application would not have been granted,

except upon equitable terms. Equity would have compelled them to do complete equity. That would have been the payment of all the purchase-money paid by her for the lands, including the reversion, and to the value of such of the improvements as she was actually and solely induced to make by her entire purchase. So the avoidance of a part necessarily involved the whole of the purchase, as otherwise complete equity could not have been done. Their laches, therefore, affected their right to set aside the purchase of Mrs. Walton, wholly or in part.

The two minor heirs are entitled to one fourth of the lands which were not set apart to the widow, and one fourth of the reversionary interest in the other lands. The other heirs have precluded themselves by laches from obtaining any relief. Mrs. Gibson is entitled to the other three fourths.

Should the minor heirs be charged for any part of the improvements?

This court has heretofore allowed a *bona fide* possessor of land compensation for improvements, upon equitable principles, independently of statutes, in three classes of cases: —

1. Where the adverse party held the legal title and was entitled to the possession. In such cases he was allowed to "offset, or recoup in damages, the improvements he had made upon the land, to the extent of the value of the rents and profits during his occupancy": *West v. Williams*, 15 Ark. 682; *Marlow v. Adams*, 24 Ark. 109; *Jones v. Johnson*, 28 Ark. 211; *Felkner v. Tighe*, 39 Ark. 357; *Brewer v. Hall*, 36 Ark. 352.

2. Where the owner knew, or ought from circumstances to have known, that the party in possession under a claim of right was making valuable improvements upon his land, and made no objection nor asserted his rights within a reasonable time. In such cases, this court allowed the full value of the improvements, less the rents: *Summers v. Howard*, 33 Ark. 490; *Grider v. Driver*, 46 Ark. 109.

3. Where the party in possession had acquired the legal title, and his purchase was set aside as fraudulent, not because of actual fraud, but on account of it being against public policy. In such cases, it allowed him compensation for the full value of his improvements, less the rents, and ordered to be refunded to him the purchase-money and taxes paid by him and interest: *West v. Waddill*, 33 Ark. 575; *Hindman v. O'Connor*, 54 Ark. 627. In *Littell v. Grady*, 38 Ark. 584, the court found that the party in possession claimed under a title

he acquired through actual fraud participated in by himself, and refused to allow him compensation for improvements, unless the adverse party claimed rents, and in that event ordered that he be allowed compensation to the extent of the rents, but no further.

In other cases this court has allowed for repairs, as in *Robertson v. Read*, 52 Ark. 381; 20 Am. St. Rep. 188; and *Jefferson v. Edrington*, 53 Ark. 545. In the last-mentioned case the court allowed the party in possession to offset the rents by the value of such improvements as a prudent man would have deemed necessary to sustain the estate.

The rule followed by this court in the third class of cases is well sustained by the authorities: *Ex parte Bennett*, 10 Ves. 400, 401; *Robinson v. Ridley*, 6 Mad. 2; *Hawley v. Cramer*, 4 Cow. 744; *Davoue v. Fanning*, 2 Johns. Ch. 271; *York Buildings, Co. v. Mackenzie*, 8 Brown Parl. C. 42; *Yeackel v. Litchfield*, 13 Allen, 419; 90 Am. Dec. 207; *Davey v. Durrant*, 1 De Gex & J. 535; *Putnam v. Ritchie*, 6 Paige, 404, 405; Sedgwick and Wait on Trial of Title to Land, sec. 698; 2 Sugden on Vendors, *897, *898; Lewin on Trusts, p. 491, sec. 2, p. 493, sec. 8. The court in such cases acts upon the principle that the party who goes into a court as a complainant to ask equity must himself be willing to do what is equitable.

Mrs. Gibson is therefore entitled to some compensation for improvements. The minor heirs are entitled to one fourth of the rents and profits of the lands which were not set apart to the widow as dower, which have accrued since the fifteenth day of October, 1879, the day on which the sale by the administratrix was confirmed by the probate court, and Mrs. Gibson is entitled to the other three fourths. They should be charged, in account with Mrs. Gibson, with one fourth of the proceeds of the sale by the administratrix of the lands which were not assigned as dower, and lawful interest thereon from the date of the payment thereof; with one fourth of the taxes paid thereon by her since the sale, and interest thereon; with one fourth of the value of the improvements made by her on the same (the lands which were not set apart as dower); and with one fourth of the proceeds of the sale by the administratrix of the reversion, and interest thereon from the date of the payment; and should be credited with the one fourth of the rents and profits to which they are entitled as before stated. Upon such an account being stated, the balance should be made a charge on the part or interest in the land belonging to the

party against whom it may be found, and the payment of it (the charge) should be enforced according to the rules of equity.

The decree of the court below is therefore reversed, and the cause is remanded for proceedings consistent with this opinion.

EXECUTORS AND ADMINISTRATORS — PURCHASE BY, AT SALE — HEIR'S RIGHTS LOST BY LACHES. — The heirs cannot repudiate a sale made by an administrator to himself, unless they elect to do so within a reasonable time, and a delay of four years by persons *sui juris* is unreasonable: *Flanders v. Flanders*, 23 Ga. 249; 68 Am. Dec. 523, and note. A purchase by an executor at his own sale is not void, but voidable by those interested acting within a reasonable time, and his possession under such purchase becomes adverse from its date: *Smith v. Granberry*, 39 Ga. 381; 99 Am. Dec. 464, and note.

LACHES. — One who commences an action within the time allowed by the statute of limitations cannot be denied relief on the ground of laches: *Cartwright v. McGowan*, 121 Ill. 388; 2 Am. St. Rep. 105.

LACHES. — What is a reasonable time in which an infant can disaffirm a deed is a question of fact: *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837, and note.

LACHES — MARRIED WOMEN. — Where a statute gives to married women full control and possession of their property, the statute of limitations runs against them as against a *feme sole*: *Casner v. Walrod*, 83 Ill. 171; 26 Am. Rep. 369.

EXECUTORS AND ADMINISTRATORS — PURCHASE BY, AT SALE — WHETHER ENTITLED TO IMPROVEMENTS: See *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252.

COCKS v. SIMMONS.

[55 ARKANSAS, 104.]

CO-TENANCY — ADVERSE POSSESSION. — Possession of one co-tenant is the possession of all, until he does some act of ouster to notify the others that his possession is exclusive.

CO-TENANCY — ADVERSE POSSESSION — TAX DEED. — The fact that one co-tenant has placed upon record a tax deed of the common property, taken to himself alone, without proof that his co-tenants knew of it, or that they knew that he claimed to hold under it, will not establish an adverse possession as against them.

TAX SALE — VALIDITY. — Where different sections of land, severally assessed, are sold in a body for the sum of the taxes due upon all, the sale and tax deed thereunder are absolutely void.

CO-TENANCY — TAX SALE — PURCHASE BY CO-TENANT. — A co-tenant who purchases the whole of the common property, at a sale thereof for delinquent taxes, does not acquire any interest or title as against his co-tenants.

TAX DEED — DESCRIPTION. — A tax deed to part of a tract of land sold for taxes due upon the whole, which indicates the corner of the legal subdi-

vision from which the part sold was taken, and the number of acres in the part, is sufficient as to description.

DEEDS — CONSTRUCTION. — A grantor who owns the undivided four fifths of land, and conveys, with covenants of general warranty, "a full half-interest in all the right, title, and interest in and to" the land, conveys an undivided half-interest in the land, and not in his interest.

CO-TENANCY — TAXES — CONTRIBUTION. — A tenant in common who pays the taxes against the whole of the common property is entitled to contribution from his co-tenants to the amount of the taxes due by each on his interest.

O. P. Lyles, for the appellant.

W. G. Weatherford, for the appellee.

HEMINGWAY, J. This was a bill on the part of tenants in common to set aside tax deeds under which their co-tenant claimed land in severalty, and for partition between them. The defendant relied upon a tax deed and a decree confirming the same as to a part of the land, and upon a subsequent tax deed and the statute of limitations as to all of it. If the defense upon either of the latter grounds be sustained, it dispenses with the consideration of the former; and we proceed to consider them. There are two adequate objections to the plea of limitation.

In the first place, there is no proof that the defendant ever held the actual possession of the land; and in the second place, if he had such possession, it would be construed as the common possession of all the co-tenants until he did some act of ouster to notify the others that his possession was exclusive: 33 Cent. L. J. 296; Freeman on Cotenancy and Partition, secs. 373 et seq.; Angell on Limitations, sec. 420. There is not only no evidence of the defendant's exclusive possession, but there is no proof that he openly asserted any exclusive right; neither is shown by proof that he placed upon record a tax deed taken to himself alone, without proof that his co-tenants knew of it, or that they knew he claimed to hold under it.

The title asserted under the deed itself is of as little avail. By the recitals of the deed, four sections of land, severally assessed, were sold in a body for the sum of the taxes due upon all. Each section was thereby sold for the taxes due upon each of the others as much for the taxes due upon it. Such a sale is absolutely void, for the collector has no more authority to sell one tract of land for a tax due upon another than for a store-account or other ordinary debt. It is said in the argu-

ment that although the deed recites a sale in a body for separate taxes, in fact the tracts were sold separately for the taxes due upon each, and that the deed should be corrected to conform to the facts. Two conditions indispensable to a grant of such relief are wanting, — pleading, and proof to justify it.

Against the former tax sale, which covered only a part of the land, it is urged that the sale was void, because it was made to a tenant in common, whose attempted purchase amounted to no more than the payment of the taxes. As the interests of the co-tenants were assessed, taxed, and sold together, the sale was occasioned alike by the default of each party. Whether either might have paid his *pro rata* of the tax, and upon the sale of the other's undivided interest, purchased it, is a question not presented nor considered. For as the defendant did not pay his part of the tax, but suffered default as to it, and made it necessary that his interest be sold with that of the plaintiff, his purchase amounted to nothing more than the payment of the tax, and gave him no right except to demand contribution from his co-tenant. The authorities upon the subject are too numerous for reference, but we adopt the views of the supreme court of Michigan, as expressed in *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446. See *Maul v. Rider*, 51 Pa. St. 377; *Freeman on Cotenancy and Partition*, sec. 158; *Cooley on Taxation*, 500; *Brown v. Hogle*, 30 Ill. 119; *Moore v. Woodall*, 40 Ark. 42.

The complaint does not question the jurisdiction of the court in the proceedings to confirm the tax title, or assail the decree of confirmation for fraud, or upon any other recognized ground. It is therefore binding upon the plaintiffs, though erroneous upon the facts, and the injustice that it does adds but one more instance of injustice to property owners flowing from decrees rendered upon constructive service. The legislature seems to have thought that the public policy subserved by such proceedings outweighed the wrongs done to individuals, and we cannot review its judgment or avert consequent hardships. The plaintiffs are entitled to no interest in the lands embraced in the decree of confirmation, but are entitled to their interest in such of the lands embraced in the tax sale as were omitted from the decree. As the plaintiff in that case obtained an inequitable and unjust decree, it is by no means clear that it should in any case be corrected so as to cure mistakes made in entering it prejudicial to him; but the pleadings and proof present no case which calls for the deter-

mination of that question, and the effect of the decree will be restricted to the lands described in it. The description of the lands in the decree is sufficiently definite and certain. It indicates the corner of the legal subdivision from which the part sold was to be taken, and the number of acres in the part. As the law provided that the part should be laid out in a square, that was sufficient to locate the part sold.

A grantor who owns an undivided four fifths of a tract of land, and conveys "a full half-interest in all the right, title, and interest in and to" the land, conveys an undivided half-interest in the land, and not in his interest. The terms of the grant are unusual, but we think they were employed to make it plain that a "full half-interest in all the title" passed by the conveyance, as distinguished from a half of the grantor's interest. The deed contains covenants of general warranty, and it must be presumed that they were inserted for some purpose; but if the thing granted was only one half of the grantor's interest, the covenant was nugatory; for if the grantor had nothing, the deed only purported to convey one half of nothing, or if he had any interest, its purport was to grant half of whatever his interest might have been. With such a description of the thing granted, covenants are meaningless; but we do not think this a reasonable interpretation of the deed. It was intended to convey a full half-interest in the land, and to warrant the title thereto.

An amended bill alleged that the defendant had cut and sold timber and received rents from the land. Of these facts there is no proof, and the plaintiffs are entitled to no relief on that account.

The defendant has paid taxes upon the land since and including 1861, for which the plaintiffs' interest was bound; the plaintiffs should pay him their portion of all sums thus paid, with interest at the rate of six per cent from the respective dates of such payments, and the same should be made a charge upon their interest in the land. The amount of such payments is not disclosed, and an account thereof must be taken.

The plaintiffs are entitled to an undivided three tenths of all the land, except those parts embraced within the decree of confirmation, and the defendant to the remainder. The court erred in dismissing the complaint; and the judgment will be reversed, and the cause remanded, with directions to enter a decree for partition, and for further proceedings in accordance with this opinion.

CO-TENANCY — POSSESSION OF ONE CO-TENANT, POSSESSION OF ALL. — *Prima facie*, the possession of one co-tenant is that of the other also: *Oglesby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177; *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note. Possession of one co-tenant is always presumed to be in accordance with the common title until some notorious and unequivocal act of exclusion occurs: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and note; *Coogler v. Rodgers*, 25 Fla. 853.

CO-TENANCY — EFFECT OF PURCHASE OF TAX TITLE BY ONE CO-TENANT. — The purchase of a tax title against the common property by one co-tenant inures to the benefit of all the co-tenants: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778, and note, with cases collected. A tenant in common cannot buy in an outstanding title, to the prejudice of his co-tenants: *Carpenter v. Carpenter*, 131 N. Y. 101; 27 Am. St. Rep. 569, and note; *Gilchrist v. Beswick*, 33 W. Va. 168.

CO-TENANCY — CONTRIBUTION AMONG CO-TENANTS FOR PAYMENT OF TAXES. — One tenant in common may compel contribution from his co-tenants for their share of the taxes rightfully paid by him upon the entire tract possessed by all as heirs: *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611, and note; note to *Moon v. Jennings*, 12 Am. St. Rep. 390; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446. But where a co-tenant has had exclusive possession and enjoyment of the common property for many years, all the while ignoring the title of his co-owners, and excluding them from any control of the land, he cannot compel such contribution: *Wistar's Appeal*, 125 Pa. St. 528; 11 Am. St. Rep. 917, and note.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY v. MURRAY.

[55 ARKANSAS, 248.]

RAILROADS — NEGLIGENCE — LIABILITY TO PASSENGER LEAPING FROM TRAIN.

— Where a passenger, through the negligent or unskillful operation of its trains by a railroad company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he is entitled to recover damages, although he would not have been injured if he had remained on the train.

RAILROADS — NEGLIGENCE — PASSENGER LEAPING FROM TRAIN — EVIDENCE.

— In an action by a passenger to recover damages for an injury received in leaping from a railroad train to avoid a threatened peril, the opinions, declarations, and acts of other passengers at the time are admissible in evidence to show how the situation appeared to the party injured, and to his fellow-passengers, and whether he acted as a man of ordinary prudence would have acted under the same circumstances or not.

EVIDENCE — EXPRESSION OF PAIN. — In an action to recover damages for personal injury, declarations made by the party injured, at or near the time of the accident, as to his present pain or injury, are admissible to show its existence; but whether the pain was real or feigned is for the jury to determine.

ACTION to recover damages for personal injury. The plaintiff, Murray, was a passenger on defendant's train, and when

about two miles from his destination, the train, after passing a curve in the road, stopped. The time was night, and while the train was standing still, another train was heard approaching on the same track. The conductor went down the track about twenty feet, and signaled the approaching train to stop. About this time a fellow-passenger of plaintiff saw the approaching train and called to the other passengers, "Here comes another train running into us; we had better get out." The plaintiff and other passengers immediately leaped from the train, and in doing so plaintiff fell into a ditch and injured one of his shoulders. The approaching train proved to be a locomotive and a caboose, which were stopped within about thirty feet of the passenger train from which plaintiff leaped. One of the plaintiff's fellow-passengers testified that he got off the train to avoid danger, and from the circumstances thought it prudent to get off the train. The plaintiff testified to the remark made by a fellow-passenger, quoted above. Another witness testified that on the night in which plaintiff was injured he assisted him in removing his coat, and the next morning assisted him in putting it on, plaintiff at both times complaining of pain in his injured shoulder. One Levissee, a brakeman on the second train, testified that if it had been made up of the usual length of loaded cars, it could not have been stopped so quickly, nor in time to have prevented it from running into the first train. All this evidence was admitted, over objections and exceptions. The following instructions, referred to in the opinion as part thereof, were given to the jury, against the objection of the defendant: "The main issues for your consideration are: 1. Did the plaintiff receive an injury? 2. Was such injury occasioned or caused by the negligence, carelessness, or improper management of the defendant? 3. Did the plaintiff, by his own negligence, contribute to the injury? Each of these propositions you are to determine from the evidence. If you should find that there was an injury received by the plaintiff, and that the same was caused by the negligence, carelessness, or improper management of the defendant, you will find for the plaintiff, unless you find also that the plaintiff by his negligence contributed to such injury. In case you should find that the plaintiff's negligence occasioned or contributed to such injury (if any), you will find for the defendant. The mere fact that the plaintiff, through fear and apprehension of danger, did an act which was the immediate cause of injury to himself, is not of itself sufficient to authorize a finding

for him; but to authorize such finding, you must also find that the defendant was guilty of some act of negligence, carelessness, or improper management in running his train in close proximity to plaintiff, which was sufficient to create in the mind of a reasonable and prudent person such fear and apprehension. Should you find that the defendant was guilty of negligence, carelessness, or improper management, and that an injury to the plaintiff was occasioned thereby, you will consider then whether the plaintiff was himself guilty of contributory negligence. If you should find from the evidence that by the negligence of the defendant the plaintiff was put in a position of great peril, and in attempting to escape that peril he did an act also dangerous, from which an injury resulted to him—such act would not necessarily be an act of contributory negligence, such as would prevent him from a recovery for such injury. The test of contributory negligence under such circumstances is, Was his attempt an unreasonable, precipitate, or rash act? or was it an act which a person of ordinary prudence might do under the like existing circumstances?—and it is not to be determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made. If you should find from the evidence that the plaintiff was carelessly, negligently, or improperly placed by the defendant in a position of danger, while in the car of the defendant, by reason of the defendant running a locomotive and caboose in close proximity to the car in which the plaintiff was, if he was in such car, then the plaintiff would have the right to judge of the danger in remaining in such car, as also the danger in attempting to escape, from the circumstances as they appeared to him, and not by the result, and if he, in making such an attempt to escape, used such care as a prudent man under such circumstances should have used, and in doing so received an injury, he should recover.” Verdict and judgment in favor of plaintiff for one thousand dollars, and defendant appealed.

E. D. Kenna and B. R. Davidson, for the appellant.

L. Gregg and J. D. Walker, for the appellee.

BATTLE, J. It is contended, on the part of appellant, that if the train on which appellee was a passenger was standing still upon the track, and the engine and caboose approaching it from the rear were under full control of those in charge of them, and

the persons in charge were keeping a proper lookout and could have stopped them, at the rate of speed at which they were running, at any time, without collision, the appellee had no cause of action, notwithstanding he was frightened and leaped from the train and injured himself. According to this contention, the appellant was not liable for damages to appellee if it was using every precaution to prevent a collision of its trains, and was under no obligations to avoid frightening him, and thereby causing him to do an act which might have resulted in injury, and would not have been liable if appellee had reasonably believed he was in great danger of being killed by a collision, and in the exercise of ordinary prudence had leaped from the train in order to save his life, and thereby injured himself. In other words, it could have, with impunity, scared him to any extent, and forced him to make dangerous leaps to save his life, and thereby injure himself, provided the precaution it used was sufficient to prevent a collision, and the fact was the appellee would not have been hurt if he had remained on the train. But this is not true. Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security reasonably consistent with their business and "appropriate to the means of conveyance employed by them," and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains: *Arkansas Mid. R'y Co. v. Canman*, 52 Ark. 517. If they recklessly, unskillfully, or negligently operate their trains, and thereby place their passengers in situations apparently so dangerous and hazardous as to create in the minds of the passengers reasonable apprehensions of peril and injury, and thereby excite, alarm, and induce them to make efforts to escape, and in the attempt to escape they receive personal injuries, the railroad companies are responsible for damages: *Jones v. Boyce*, 1 Stark. 493; *Stokes v. Saltonstall*, 13 Pet. 181; *Caswell v. Boston etc. R. R. Co.*, 98 Mass. 194; 93 Am Dec. 151; *Twomley v. Central Park etc. R. R. Co.*, 69 N. Y. 158; 25 Am. Rep. 162.

In order to render the railroad company liable for injuries received in an effort to escape an apprehended danger, there must have been a reasonable cause of alarm occasioned by the

negligence or misconduct of the company. If the effort of the passenger to escape resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. But if, on the other hand, he be placed, through the negligent or unskillful operation of its trains by the railroad company, in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained on the train.

On occasions where a passenger is suddenly confronted by imminent danger and peril, he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but "must, of necessity, judge hastily of the danger of remaining where he is, as also of the danger of attempting to escape, by the circumstances as they, at the instant, appear to him, and not by the result." He acts upon the probabilities as they appear to him, and if he acts as a man of ordinary prudence, "placed in the same circumstances and under a like necessity of immediate action and decision," would have acted, and in so doing makes an effort to escape and is injured, the railroad company is responsible to him for his damages: See cases above cited, and *Wilson v. Northern Pac. R. R. Co.*, 26 Minn. 278; 37 Am. Rep. 410.

Chicago etc. R'y Co. v. Felton, 125 Ill. 458, and *Gulf etc. R'y Co. v. Wallen*, 65 Tex. 568, cited by appellant to sustain its contention, do not controvert the rule as we have stated it, but recognize it as correct. In the former case, the plaintiff's intestate was a passenger on the defendant's train. He was going from Ottawa to Joliet, in Illinois. From Ottawa to Chicago the defendant used a double track, and trains going in the same direction generally used one track, and those going in the opposite direction used the other. At the time plaintiff's intestate was a passenger, the tracks were covered with snow. The train on which he was riding ran into a snow-bank and stopped. At a point a short distance from where it stopped and in the rear of it the road curves. It was impossible for a person looking from the point where the snow-bank was in the direction of the curve to tell whether a car beyond the commencement of the curve was upon the one track or the other. While the train was stopped at the snow-bank, plaintiff's intestate, on looking back, saw an engine with a snow-plow attached approaching from the direction of the curve.

About this time a fellow-passenger remarked that it would run into the passenger train. One witness said, "It looked as if it was coming into the train." About the same time, an engine in front of the passenger train gave sharp, quick whistles. Whereupon plaintiff's intestate became alarmed, and leaped from the car in which he was riding to the ground, and was fatally injured. This was about three o'clock in the morning. The passenger train was standing on one track, and the engine with the snow-plow attached approached, running on the other. There was no collision, and the intestate would not have been hurt if he had remained in the car. Justice Scholfield, in delivering the opinion of the court, said: "Since the right of recovery here is based upon the negligence of the defendant, it is not sufficient merely that plaintiff's intestate became alarmed by reason of appearances produced wholly or in part by the defendant: it must appear that that which produced the alarm, and through it the injury, was negligence of the defendant." Treating the signals given by the whistles as presenting the only question of negligence, he further said: "The burden is upon the plaintiff to prove this negligence, and that is not done by proof alone that a peculiar signal was given by an engine of the defendant, and that it caused or aggravated the alarm of the intestate. If the signal given was, under the circumstances, a proper one, it cannot have been negligence to give it."

In *Gulf etc. R'y Co. v. Wallen*, 65 Tex. 568, "the plaintiff and his wife were passengers on a train on defendant's road which stopped between two stations and remained standing for about an hour. While the train was so standing, another passenger called out, 'Here comes a train right on us. Other passengers jumped to their feet and scrambled to get out of the car door. Plaintiff looked through the rear door, and saw a freight train coming towards the passenger train, and about three hundred or four hundred yards off. . . . He called to his wife, and both ran to the car platform and jumped to the ground. His wife was seriously injured.' The freight train stopped one hundred yards in the rear of the passenger train. The court said: "The defendant neither caused nor contributed to the injury of plaintiff's wife, unless it allowed the freight train to come so near to or so rapidly towards the passenger-coach as to frighten the passenger. It does not appear from the testimony that a single one of those who leaped from the train, except the plaintiff, saw the freight

train coming. When the plaintiff saw it, it was three hundred or four hundred yards distant, and as he says, appeared to be moving rapidly. He does not state that he supposed from what he saw that there would have been a collision. No one left the train upon his own perception of danger. . . . The statement of facts develops no cause whatever for the panic which seized some of those in the cars, except a remark made by some one, that 'the freight train is upon us.' . . . The plaintiff's wife may have done only what a prudent person would have done under the same circumstances, and the defendant still not be liable. If a ruffian had commenced the discharge of a revolver in the car, it would have been prudent for people to get out, but the carrier would not have been liable, unless it committed some fault. The ruffian could be held, as could a passenger, who, in brutal sport, raises a false alarm and causes damage. . . . We can find in the statement of facts in the record here no proof that the defendant was guilty of any act of negligence contributing to the injury of plaintiff's wife."

The instructions which were asked by the plaintiff and given by the court and are set out in this opinion were substantially correct. They fairly submitted to the jury the question of fact upon the decision of which the plaintiff's right of recovery depended.

The testimony of the witness, to the effect that he thought it was prudent to get off the train, and that he left it for the purpose of avoiding danger, and the testimony of another, that a fellow-passenger said, "Here comes another train running into us," and said, "We had better get out of there," and of Levissee, were admissible for the purpose of showing, in some degree, how the situation of appellee appeared to him and his fellow-passengers at the time he leaped from the train and was hurt, and that in so doing he acted as a man of ordinary prudence would have acted under the same circumstances.

The testimony as to Rivercomb assisting appellee in pulling off and putting on his coat, and appellee complaining of being hurt in the shoulder, was not admissible as a part of the *res gestæ*, but was admissible to show the existence of present pain and injury in the shoulder. And whether this action and complaint as to injury in the shoulder were real or feigned was for the jury to determine: *Travelers Ins. Co. v. Mosley*, 8 Wall. 397, 405, 407; *Bridge v. Oshkosh*, 67 Wis. 195; *Bacon v. Charlton*, 7 Cush. 586; *Barber v. Merriam*, 11 Allen, 322, 324;

Hatch v. Fuller, 131 Mass. 574; *Atchison etc. R'y Co. v. Johns*, 36 Kan. 769; 59 Am. Rep. 609, and cases cited; *Bridge v. Oshkosh*, 71 Wis. 363; 1 Greenl. Ev., 14th ed., sec. 102.

Appellant contends that the verdict of the jury was against the decided preponderance of evidence, was not sustained by sufficient evidence, and should be set aside. If such was the case, the circuit court had the right and should have set it aside and granted a new trial. But the judge, who was present and saw and heard the witnesses testify, and heard the testimony as it was heard by the jury, and ought to be a better judge of the credibility of witnesses and the weight of the testimony than we, considering it as it appears on paper, can be, it seems, did not think as appellant contends. But be this as it may, it is not necessary for us to approve the verdict. There was evidence to sustain it, and according to the rules which govern this court, we cannot disturb the same.

Judgment affirmed.

RAILROADS — LIABILITY TO PASSENGER LEAPING FROM TRAIN TO AVOID DANGER. — It is not necessarily negligent in a passenger to jump from a rapidly moving train in an attempt to avoid an impending collision: *Wilson v. Northern P. R. R. Co.*, 23 Minn. 278; 37 Am. Rep. 410; *Buel v. New York etc. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271, and note. See extended note to *Walker v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 422. But one who in panic leaps from a railway car while in motion, and is injured, cannot recover therefor against the company, where such panic arose from causes with which it had no connection: *Reary v. Louisville etc. R'y Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497, and note. The law does not require one who is surprised and confused by a sudden danger should act according to any fixed rule: *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 879; *Galena etc. R. R. Co. v. Yarwood*, 17 Ill. 509; 65 Am. Dec. 682. To the same effect, see *Western Maryland R. R. Co. v. Harold*, 74 Md. 510.

EVIDENCE. — EXCLAMATIONS AND CONDUCT OF THE PASSENGERS IN A CAR AT THE TIME OF AN ACCIDENT are admissible in evidence as tending to show how the circumstances of apparent danger impressed others, and to vindicate from rashness the conduct of the plaintiff in leaping from the train, whereby he was injured: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323.

GRAHAM v. THOMPSON.

[55 ARKANSAS, 296.]

ESTOPPEL — CONSTRUCTIVE NOTICE. — FALSE REPRESENTATIONS, if relied upon by a party ignorant of the truth, may create an estoppel in his favor, although he had constructive notice of their falsity by matter of record.

ESTOPPEL — FALSE REPRESENTATIONS — NOTICE. — One who claims the benefit of an estoppel, on account of representations made, must show that he was ignorant of the truth and acted in reliance upon such false representations. Such estoppel can be defeated only by actual and not by constructive notice of the falsity of the representations.

ESTOPPEL TO DENY TITLE — CREDIT ON FALSE REPRESENTATIONS. — One who induces another to extend credit to a third person, by representing the latter to be the owner of land, will be estopped, after such representations have been acted upon, from denying such ownership.

INJUNCTION. It appeared that one Cheairs conveyed a certain piece of land to his daughter, Mrs. Hickey, the deed reciting the payment of the purchase-money. The appellees, Thompson and Hatcher, extended credit to the grantee, relying upon the representations made by the grantor as stated in the opinion. Mrs. Hickey subsequently reconveyed the land to Cheairs, the deed reciting the consideration to be the unpaid purchase-money. Cheairs then conveyed the land to the appellant, Graham. The appellees obtained judgment against Mrs. Hickey on account, for the credit extended to her, and procured an execution to be levied on the land. Graham then sought by injunction to restrain the sheriff from selling the land to satisfy such judgment. Judgment against Graham, from which he appealed.

W. G. Weatherford, for the appellant.

N. W. Norton, and Sanders and Watkins, for the appellees.

HEMINGWAY, J. If the conveyance from Mrs. Hickey to Cheairs was without consideration, it was fraudulent as to her prior creditors and void. It is therefore necessary for Graham, whose rights in this case depend upon that deed, to show that it was executed for a valuable consideration; and if he fails therein, his right to relief likewise fails. The evidence shows that it was executed in satisfaction of a debt from Mrs. Hickey to Cheairs for the purchase of the land, and that there was no other consideration therefor. The appellees contend, and the court held, that Cheairs and those claiming under him were estopped to set up such consideration, and upon the correct-

ness of that ruling this appeal depends. The matter relied upon as an estoppel was, we think, proved by a preponderance of the evidence; and the question is, whether it was sufficient in law to constitute an estoppel. It was, in substance, as follows: Before the debt with appellees was contracted by Mrs. Hickey, Cheairs stated to the appellees that he had given the land in controversy to her, and that she would live in the community, and perhaps desire assistance in the way of supplies, and that any accommodation shown her would be appreciated by him. The appellees believed that the land was a gift from Cheairs to Mrs. Hickey, and upon the credit thereof made the advances out of which their debt grew. When recommending Mrs. Hickey for credit, Cheairs did not say, in so many words, that she owed him nothing for the land; but he did say that he had given it to her, and this negatived the existence of a debt for it. So that when he induced the appellees to credit her, he, in effect, said that she owed him nothing for the land; and when they seek to collect their debt, he alleges that he had sold it, and that the purchase-money was unpaid. The question is, Will he be heard to say this?

The principle is broadly stated, that a person who intentionally induces another to act on his representations will be estopped from denying their truth, wherever this would occasion wrong or injustice to him who acted upon such reliance: 2 Herman on Estoppel, sec. 788.

But it is contended that this principle does not apply in this case, because the land records of the county, of which the appellees had constructive notice, disclosed the fact that the land had been sold, not given, to Mrs. Hickey, and the appellees were guilty of laches in not examining the records; and also because the appellees did not, by crediting Mrs. Hickey without taking some specific lien on the land, place themselves in a position to avail themselves of an estoppel.

One who claims the benefit of an estoppel on account of representations made must show that he was ignorant of the truth, and acted in reliance upon the false representations. But to defeat the estoppel on that ground, actual and not constructive knowledge is necessary. The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them. To this principle many authorities might be cited: *Gammill v. John-*

son, 47 Ark. 335; Bigelow on Estoppel, 627; *Dodge v. Pope*, 93 Ind. 480; *David v. Park*, 103 Mass. 501; *Holland v. Anderson*, 38 Mo. 55; *Evans v. Forstall*, 58 Miss. 30; *Kiefer v. Rogers*, 19 Minn. 32.

Estoppel on account of representations as to title is generally set up by parties who have become purchasers in reliance thereon; but we see no reason why the same principle should not protect creditors who have given credit upon the ownership of the property as disclosed by such representations. Upon this point we find but few authorities, but those found sustain this application of the principle; and we think it results from the reason and origin of the rule: Bigelow on Estoppel, 586, 587; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

As Cheairs stated that the conveyance was a gift, in order to induce a credit, he should not be heard to say that it was a sale, in order to defeat its collection. As Graham purchased with notice, he is in no better attitude than Cheairs.

Affirm.

ESTOPPEL BY FALSE REPRESENTATIONS — EFFECT OF NOTICE. — A party setting up estoppel by conduct must show that he exercised good faith and due diligence to know the truth, and if any circumstances are brought to his notice which would excite inquiry in the mind of a reasonably prudent man, and such means of satisfying himself were accessible and were not used, he cannot be held to have exercised good faith and due diligence: *Morgan v. Farrel*, 58 Conn. 413; 18 Am. St. Rep. 282; *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307, and note. In order to constitute an estoppel by false representations, the party to whom they were made must have been ignorant of the truth of the matter: *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, and note; *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365, and note. The mere silence of a party will not work an estoppel, where the other party is acquainted with the facts: *Jones v. Portsmouth Aqueduct*, 62 N. H. 488.

BURCHAM v. TERRY.

[55 ARKANSAS, 398.]

TAXES — PUBLIC LANDS. — After a final homestead certificate to public lands has been issued, entitling the holder to a patent, the lands are subject to state taxation, although the patent has not yet issued.

JUDGMENTS — TAX DECREE — CONCLUSIVENESS. — A decree, by a court having jurisdiction, enforcing a lien for unpaid taxes is conclusive of all matters which might have been litigated in the tax suit, and cannot be collaterally attacked by showing that illegal taxes have been assessed against the land, and that it was assessed for taxation when it was not liable for taxes.

J. V. Bourland, for the appellant.

E. H. Mathes, for the appellee.

HUGHES, J. This is a suit by appellant to recover the possession of land described in the complaint, for title to which the appellant relies upon a deed from Paul M. Cobbs, commissioner of state lands, executed to him, which deed recites and is based upon a sale of the land to the state, under the overdue tax act of 1881.

The appellee claims ownership to the land through Edward Tolbert, who "homesteaded" the land in 1875 under the United States homestead laws, and obtained his "final certificate" from the United States on the 20th of January, 1882, and received a patent from the United States therefor the tenth day of February, 1883. Appellee denies the validity of appellant's deed, because, he says, the land was owned by the United States in the years 1880 and 1881, for the taxes of which years the lands were proceeded against in the overdue tax suit, and for which they were sold to the state; that said deed is void because the land was sold for certain illegal taxes and for an attorney's fee of five dollars in gross, etc.

The suit against these lands under the overdue tax act was commenced on the 14th of October, 1882, after Tolbert had obtained his "final certificate." The court below found the facts substantially as stated, and declared the deed of the state to appellee void, for the reason that the state had acquired no title to the lands at the overdue tax sale, because the lands were the property of the United States in 1880 and 1881, for the taxes assessed for which years they had been sold, and also for the reason that illegal taxes were assessed for said years against said lands, and for which they were adjudged to be sold, as well as for other taxes.

In *Gilkerson-Sloss Com. Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29, it is held that "one who has become entitled to a patent under the homestead act of Congress may mortgage the land before the patent issues"; that "when a person does everything that is necessary to entitle him to a patent for a tract of public land, he becomes the equitable owner thereof. The land is segregated from the public domain, ceases to be the property of the government, and in the absence of limitations and restrictions legally imposed, becomes subject to private ownership and all the incidents and liabilities thereof."

Among the most certain incidents and liabilities of the

ownership of property by a private person is its liability to taxation. That the owner of lands entered at the United States land-office should be able to claim that they were exempt from taxation until he should have obtained a patent for them from the government cannot be maintained. If this could be the case, a large amount of lands owned by private persons would escape taxation, at least until a patent issued for them. It follows that these lands in controversy were subject to taxation after the "final certificate" was issued to Tolbert, and they were subject to taxation at the date of the decree and sale in the overdue tax suit.

The chancery court that rendered the decree under which they were sold to the state had jurisdiction of the subject-matter of the suit, which was a proceeding *in rem*. That illegal taxes had been assessed against the lands, and that they had been assessed for taxation for years when they were not liable for taxes, were matters of defense which might have been shown in the overdue tax suit, but they cannot be shown in a collateral suit. These matters might have been litigated in the overdue tax suit, and the decree in that suit is conclusive here as to all matters that could have been litigated in that suit, except the question of jurisdiction: *Mayo v. Ah Loy*, 32 Cal. 477; 91 Am. Dec. 595. This case falls within the principle decided in *McCarter v. Neil*, 50 Ark. 188, and *Williamson v. Mimms*, 49 Ark. 336: 1 Black on Judgments, sec. 245.

The judgment is reversed, and the cause is remanded for a new trial.

PUBLIC LANDS — WHEN CERTAIN RIGHTS AND LIABILITIES ATTACH TO. — When a person has done everything necessary under the homestead laws to entitle him to a patent to a tract of public land, he may mortgage it before the patent therefor is issued to him: *Gilkerson-Sloss etc. Co. v. Forbes*, 54 Ark. 148; 26 Am. St. Rep. 29, and note. A homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor: *Paull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836.

TAXES — CONCLUSIVENESS OF JUDGMENTS FOR. — Judgments for taxes have the same effect as judgments for other causes of action, so far as concerns the question whether the judgment is voidable or absolutely void: *Mayo v. Ah Loy*, 32 Cal. 477; 91 Am. Dec. 595, and note.

ROBBINS v. KIMBALL.

[55 ARKANSAS, 414.]

STATUTE OF FRAUDS — PAROL AGREEMENT CONCERNING PURCHASE OF LAND. — A parol agreement between one who obtains the title to land in himself alone, and with his own means, and another, that the latter is to have an interest therein upon paying one half of the expenses incurred in acquiring the title, or that the purchase is to be made for their joint benefit, is void as being within the statute of frauds, and cannot be enforced as against the party obtaining the title.

SPECIFIC PERFORMANCE — PAROL AGREEMENT CONCERNING PURCHASE OF LAND. — A parol agreement between two, that land is to be purchased by one for the joint benefit of both, cannot be specifically enforced by one of them, who fails to clearly prove that he has complied, or offered to comply, with the conditions of the contract.

CONTRACT — CONSTRUCTION WHEN TERMS ARE IN DOUBT. — Where the terms of a parol agreement are in doubt, the acts of the parties in the execution of it are the best guides for its interpretation.

ACTION by Robbins against Kimball to establish a trust in land purchased by and conveyed to the latter alone. Judgment for the defendant, and plaintiff appealed.

S. S. Wassell and S. W. Williams, for the appellant.

John M. Moore and S. R. Allen, for the appellee.

COCKRILL, C. J. If Kimball obtained the title to the land in controversy with his own means, under a parol agreement with Robbins to let him have an interest in it, on condition that he would pay one half the expenses incurred in acquiring the title, the contract would be void by reason of the statute of frauds, and Robbins could take nothing through it. It could not be enforced, for the further reason that Robbins has not complied, or offered to comply, with the condition by paying his share of the expense which it is admitted Kimball rightfully incurred. If the agreement was that Kimball was to purchase for the joint benefit of himself and Robbins, but the title was taken to himself alone, the contract would still be within the statute of frauds. If he used none of Robbins's means in making the purchase, there would be only the breach of a parol agreement, which cannot raise a trust or form the basis of a title.

There is no evidence to warrant the conclusion that the parties were partners in buying and selling real estate. The only route by which Robbins can arrive at an equity in the land is to adduce from the evidence clear and satisfactory proof that Kimball made use of his means in making the pur-

chase, and thereby establish an equitable interest in the land through the medium of a resulting trust.

It is material, therefore, to review the conflicting and re-criminating testimony, in which the record abounds, only for the purpose of ascertaining whether any money of Robbins went into the purchase of the land. Beyond that it need not be noticed.

It is certain that Kimball purchased the right to acquire the title to the lands—an option, as the parties term it—for the sum of \$5,000, and that Robbins paid no part of it; also, that the then owner of the land executed a deed to Kimball in pursuance of that contract, when Kimball paid him the sum of \$11,666.66, and gave him his two notes for like sums for the residue of the purchase price. Since that time, Kimball has partly discharged these notes by payments. Robbins has paid nothing. The only pretense that can be made of any use of his funds was in the payment of the \$11,666.66. That had been raised upon a mortgage by Robbins and Kimball to one Shirk of lands belonging severally to them, and the argument is, that it was the joint fund of the two parties, and that Robbins acquired an equitable interest in the land to the extent of his interest in the fund.

Kimball's version of the transaction is, that about the time he purchased the option of the right to acquire the title, he made an oral agreement with Robbins, to the effect that the latter should have the privilege of sharing in his trade when or upon the condition that he paid one half of the price asked for the option and one half the purchase price of the land; that it was in pursuance of that agreement the Shirk mortgage was executed; that the money thus borrowed was for his own use, and not for the use of Robbins, or of himself and Robbins, and that Robbins, in effect, joined in the mortgage note and put his lands in the mortgage as in the nature of a security for him to carry out his purchase in accordance with their contract, with the expectation on Robbins's part of fulfilling his agreement to pay one half of the expense previously incurred, and thereby being let into the equal enjoyment of the transaction. Robbins denies all this, and claims that the mortgage transaction was an ordinary joint borrowing for their mutual benefit, and that the fund raised was their joint fund.

The circumstances tend to sustain Kimball's version. He negotiated the loan as for himself alone, the money was re-

mitted to him, it was deposited to his individual credit in the bank, and was paid out upon his individual draft, Robbins offering no protest nor suggesting any other course. Robbins was unable or unwilling to pay Kimball the amount he concedes was due him under the terms of their agreement, and at this juncture, several months after the deed to the property in question was delivered, Kimball executed a mortgage to Shirk upon his homestead which was not included in the first mortgage, and thereby procured from Shirk a formal written release of Robbins's land from the operation of the mortgage, and caused it to be delivered to Robbins after it was duly recorded. Thereafter, Robbins mortgaged and sold the real estate described in the release as though the Shirk mortgage had no existence,—directing the attention of those with whom he dealt to the record evidence of the release, and thereby procuring them to disregard the existence of the mortgage by relying upon the release. By that conduct he derived the full benefit of the release, and that result is inconsistent with his position that he repudiated it.

We must take it, then, that he accepted the release. But the fact that he accepted the release, and thereby resumed the position he occupied before the negotiation, is strong corroborative evidence of Kimball's version of the contract as a conditional sale, and of Robbins's attitude toward the Shirk mortgage. This subsequent conduct sheds a light back upon the contract, and enables us to see what were probably its original terms. The parties themselves, not expecting a controversy about the contract, in all probability had not a very definite understanding of its terms, or of their legal *status* under it. What they did, therefore, in the execution of it is the best guide attainable for its interpretation: *Watkins v. Greer*, 52 Ark. 65; *Gauss Sons v. Orr*, 46 Ark. 129.

Robbins has failed to disclose a clear and satisfactory state of case as to the payment of his money in the purchase of the land, and the security which he furnished has been restored to and accepted by him. He has thus voluntarily assumed the position which Kimball says he was to take upon failure to comply with the terms of his conditional purchase. We must infer, therefore, that Kimball's recollection of the contract represents it in its true light.

For the reasons already assigned, it cannot be enforced.

Affirmed.

STATUTE OF FRAUDS — VERBAL AGREEMENT FOR PURCHASE OF LAND. — A verbal contract for the purchase of land, unaccompanied by part payment of the purchase price, is void, under the statute of frauds: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368, and note. A verbal agreement by one to purchase an interest in land for another is void: *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619, and note.

SPECIFIC PERFORMANCE OF PAROL AGREEMENT CONCERNING CONVEYANCE OF LAND. — Equity will enforce a parol agreement between two parties that one will purchase land for the other, and take the title to himself, and hold it for such other until the latter can pay for it, and when paid for will convey it to him: *Cohn v. Chapman*, Phill. Eq. 92; 93 Am. Dec. 600, and note. Where a parol contract for the conveyance of land has been taken out of the statute of frauds by possession and performance on one side, and improvements have been made in reliance on the contract, specific performance will be decreed: *Burns v. Fox*, 113 Ind. 205; *Burlingame v. Rowland*, 77 Cal. 315; *Hunter v. Mills*, 29 S. C. 72; *Young v. Young*, 45 N. J. Eq. 27.

CONTRACTS — CONSTRUCTION OF, WHEN TERMS IN DOUBT. — In construing contracts, the court should put itself as near as possible in the situation of the parties, and from a consideration of the surrounding circumstances and apparent object of the parties, determine the meaning and intent of the language used by them: *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581, and note. A verbal agreement will be construed according to the facts and circumstances of the case: *Arbuckle v. Smith*, 74 Mich. 568. Courts of equity look to the substance and effect of transactions, and will not be deceived by mere forms or words, when the conduct of the parties contradict the forms and words used as a cover to their transactions: *Thompson v. Andrus*, 73 Mich. 551.

LITTLE ROCK AND FORT SMITH RAILWAY COMPANY v. LAWTON.

[55 ARKANSAS, 423.]

RAILROADS — DUTY AND LIABILITY TO ESCORT OF PASSENGER. — A person who enters a railway car merely as the necessary escort to a passenger, with the knowledge of the train-men, enters upon an implied invitation, which entitles him to ordinary care from the carrier, and to recover for any injury caused by its omission; but he cannot recover unless he proves that the injury was caused by the negligence of the carrier.

RAILROADS — DUTY TO HOLD TRAIN FOR ONE ASSISTING PASSENGER. — Where one enters a railway train merely to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, upon its implied invitation, and with knowledge of his purpose, it is bound to hold the train a reasonable time to enable him to render such service and to leave the car.

RAILROADS — DUTY TO HOLD TRAIN FOR PARTY ASSISTING PASSENGER — NOTICE. — One who enters a railway train merely as an escort, and to render necessary assistance to a passenger, without notice to or the knowledge of the train-men as to his purpose, cannot recover for injury

sustained in leaving the train, by reason of a failure to hold it a reasonable time to enable him to accomplish his purpose and to leave the train.

RAILROADS — RIGHT OF ESCORT TO ENTER CARS. — Where the railway employees upon a train offer all necessary assistance to a passenger, his escort has no right to enter the cars merely as an escort, and the carrier owes the latter no duty, except to refrain from willful or wanton injury to him.

RAILROADS — REGULATIONS — NOTICE TO TRESPASSERS. — A notice that all persons not having business with a railway company are positively forbidden to enter any of its cars does not apply to a person who attends a passenger to render necessary assistance.

Dodge and Johnson, for the appellant.

A. S. McKennon, for the appellee.

HEMINGWAY, J. This was an action to recover damages for personal injuries sustained by the plaintiff while leaving the defendant's car, into which he had gone to escort a woman and child, and assist them, with their hand-baggage, to a seat.

The matters charged in the complaint to cast liability upon the defendant are as follows: 1. That the defendant did not stop its train the usual length of time, or a reasonable time for persons to get on and off, and by reason thereof the plaintiff fell from the step, and was injured while attempting to leave the car; and 2. That while he was engaged in leaving the car the train started with a sudden jerk, and defendant's porter gave him "a violent thrust" with his elbow, by reason whereof he was violently thrown to the platform of the depot and badly hurt.

The questions arising upon the latter ground had better be disposed of at the outset, for as to them we find little difficulty in reaching a conclusion. According to the evidence, including that of the plaintiff himself, the sudden jerk, if there were any, occurred while he was in the car, and caused him no injury; it certainly had no connection with the hurt he received in being subsequently thrown from the steps of the car. The porter's thrust was given as he stepped upon the car to resume his trip, and it is not alleged in the complaint nor shown by the evidence that it was due to his careless or willful neglect. It appears that he acted as porters usually do in getting upon a train that is starting upon its course, and as it was his duty to get aboard, and there is no evidence that he did it in an improper manner, it discloses no negligence. The instructions which based a right of recovery upon this ground were improper, and should not have been given.

A more difficult question arises upon the other ground of alleged negligence, — one not settled by any decision of this court. The defendant insists, that inasmuch as the plaintiff did not enter the car to take passage upon it, but only as escort to a passenger, the defendant owed him no duty except not to injure him willfully or wantonly; while the plaintiff contends, that as he went upon the car with the knowledge of the train-men, and for the purpose of rendering necessary assistance to a female passenger and little child, the defendant owed him the same duties as a passenger. The learned counsel who has presented the cause for the plaintiff cites us to no authority in support of his contention, and it impresses us as unsound; the cases relied upon by the defendant do not, as we think, bear out his position, but show that it is untenable: *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 34; 21 Am. Rep. 371; *Coleman v. Georgia R. R. Co.*, 84 Ga. 1. We have concluded that neither view is correct, but that reason commends as proper a rule between the two.

In the case of *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, the supreme court of Indiana held that a railroad company owed the same duty to those assisting a passenger upon a train as to the passenger himself; but it cites no precedent for the ruling, and it is opposed to all cases adjudged upon the subject to which our attention has been called. The law exacts from railroads, for the protection of passengers, the highest degree of care, and imposes a liability for all injuries which sound judgment, skill, and the most vigilant oversight could have prevented; but this responsibility grows out of the relation or contract of carrier and passenger, on account of the great perils of the undertaking. As this is the cause and origin of the rule, it would seem that the rule should be restricted in its application to persons who come within that relation, and such is the effect of the authorities: *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 606; *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 34; 21 Am. Rep. 371; *Coleman v. Georgia R. R. Co.*, 84 Ga. 1; *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652; Thompson on Carriers of Passengers, p. 49, sec. 7.

But a denial that the extreme responsibility contended for exists is not an affirmance of the rule that responsibility is restricted to wrongs that are willful or wanton. Such conclusion would rest upon the premise that one attending a pas-

passenger enters the car from curiosity or upon his own business under a mere license from the company, and not upon business connected with the company upon an implied invitation. If this premise be false and the converse correct, then, according to the decisions of this and other courts, the carrier would be bound to the exercise of ordinary care: *St. Louis etc. R'y Co. v. Fairbairn*, 48 Ark. 491; *Holmes v. Northeastern R'y Co.*, L. R. 4 Ex. 254; and that it is so bound in cases like this is held in the cases first cited, as well as in others upon the subject: *Gillis v. Pennsylvania R'y Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652. In our opinion, the rule is correct upon principle. For it is a matter of common knowledge, that in the usual conduct of the passenger business, it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for the security and convenience of the traveler, it has proven beneficial to carriers, and now prevails in this state and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. It cannot be doubted that it has increased travel and the earnings of carriers, while it has promoted the convenience and security of passengers; and if it should be abrogated, many persons would be compelled to forego journeys, to the detriment of the carrier and their own inconvenience. We conclude that such attendant performs a service in the common interest of carrier and passenger, and that his entry upon a car is upon an implied invitation which entitles him to demand ordinary care of the carrier.

But although we think the attendant is entitled to demand ordinary care for his protection, and would be entitled to recover for an injury caused by its omission, still he could not recover unless he established that his injury was caused by some negligent act or omission on part of the carrier. The word "negligence" implies a duty as well as its breach, and the fact can never be found in the absence of a duty. Assuming, then, that the plaintiff went upon the train to render necessary assistance to a female passenger and child, and that those in charge of the train knew that he was upon it, was it the duty of defendant to hold the train the full length of time that was usually required for passengers to get off and on the cars

at that place? The court charged the jury that it was, and this presents the controlling question upon this appeal.

We frequently find the statement of a rule that trains must be stopped a reasonable time for all passengers who desire to stop at the station to get off and outgoing passengers to get on, and when applied in a proper case, the rule is no doubt sound. But the rule is designed for the benefit of passengers only who desire to end or begin their journey, and cannot be invoked as a ground for recovery by other persons.

If one, intending to transact important business with a passenger, should be disappointed by reason of an unusually short stop, he could not invoke the rule, although a stop for the usual time would have benefited him greatly; nor could the passenger complain for the failure to stop, unless it was the station of his destination. And even as to passengers, the rule does not require a stop for any usual, stated time, but only for a reasonable time to permit those who desire to stop to get off and outgoing passengers to get on. It is obvious that this time would vary, and that a stop which would be reasonable at one time, when there were but few desiring to get on or off, would be unreasonable at another, when there were many; but it is the duty of passengers, when the train stops, to proceed with reasonable expedition to get off or on, as they desire, and if sufficient time for this purpose be given, the rule stated requires no longer stop, and the train may resume its progress. We do not think this rule can be invoked to sustain the plaintiff's claim. But one who goes upon the train to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, in its interest and upon its implied invitation, as before stated, has a right to render the needed assistance and leave the car, and the railroad, in permitting him to enter it with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor: *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652.

But the duty is dependent upon the knowledge of his purpose by those in charge of the train; for without such knowledge, they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after allowing him a reasonable time to get aboard. The law could not, in reason or justice, impose as a duty the doing of that which, in the light of everything known to the train-men, would not appear necessary or proper, nor hold that the cars should be

stopped when there was no reason to stop them, except a fact unknown to them. If the attendant intended to become a passenger, he had no reason to ask a continued stop; and if he desired to get off, and that alone made a longer stop necessary, he could not expect or ask that it be made where no occasion for it was known to those in charge. Even where a passenger desires to stop at an intermediate station, he must make his desire known; and if he neglect this, he cannot complain if he is carried past his station: *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652; *Coleman v. Georgia R. R. Co.*, 84 Ga. 1. If such notice is required of passengers, it should, with at least equal reason, be exacted of others, and we are of opinion that it is essential to fix a duty in that regard.

The court charged the jury that if the employees upon the cars offered to assist the woman and child to a seat, and to care for their hand-baggage, the plaintiff had no right to enter the car, and the defendant owed him no duty except to refrain from willful or wanton injury to him. This was proper; for if the defendant's employees offered to perform that service, there was no necessity for an escort, and the act of plaintiff in going on the cars was not done upon any implied invitation of the defendant.

The notice that all persons not having business with the company were positively forbidden to enter any of the defendant's cars would not apply to a person who attended a passenger to render needed assistance; if it does, it might be seriously questioned whether it would not be unreasonable and void, where the company failed to furnish necessary attendants to render such assistance. Proof of the notice was immaterial, and proof of the custom on part of the railroad employees was likewise immaterial, but harmless.

Tested by the rule above announced, the court properly refused the second, fourth, sixth, and seventh instructions asked by the defendant, and committed no error in modifying the fifth, eighth, and ninth; the appellee concedes that the third announced the law, but contends that it was covered by other parts of the charge; we have therefore treated it as correct, and the court will see upon a retrial that the charge given covers it.

The instructions for plaintiff all embody the principle that it was the duty of the defendant to stop the train the usual length of time for permitting passengers to alight and embark, regardless of defendant's knowledge that plaintiff wished to

get off, and that the omission thereof might be the basis of a recovery; whereas, we hold that there was no duty to hold the train without such knowledge, and that if the duty existed, it was to hold the train long enough to permit plaintiff to go on, assist the woman to a seat, and then get off.

For the errors in charging the jury, the judgment will be reversed, and the cause remanded. As the evidence upon another trial may differ materially from that disclosed by the record, we have not determined whether it would justify a finding for the plaintiff; but lest our silence be misconstrued, we deem it proper to state that the judges have suggested doubts, upon their part, whether the plaintiff's own testimony did not establish such imprudence and recklessness upon his part in attempting to leave the train after it was in motion as would preclude a recovery, even if the defendant is shown to have been guilty of negligence.

RAILROAD COMPANIES — DUTY TO PERSON ASSISTING PASSENGER. — Ordinary Care. — The weight of authority undoubtedly sustains the proposition that a person who resorts to the station or cars of a railroad company for the purpose of assisting an incoming or outgoing passenger is there under the implied invitation of the company, and is not a trespasser. But unless the company or its employees have notice of his purpose to assist a passenger to a seat only, or of his intention to merely assist a passenger to alight from the train, it is not under the same obligation, as to protection, that it owes to the passenger, and is only bound to exercise ordinary care not to injure him when he is attempting to alight from the train: *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Coleman v. Georgia R. R. Co.*, 84 Ga. 1; *Central R. R. etc. Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505; *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652; *Pittsburgh etc. R'y Co. v. Bingham*, 29 Ohio St. 364; 23 Am. Rep. 751-757; *Keokuk Packet Co. v. Henry*, 50 Ill. 264. The rule as supported by these authorities is thus announced in *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406: A railroad company need exercise only ordinary care toward one who enters its cars, not as a passenger, but to assist an aged and infirm relative to a seat, and is not bound to give such person any special notice of the time of the departure of the train, and he cannot recover for injuries received in leaving the cars, if he attempts to leave them after the train starts, or finding the cars in motion when attempting to leave, he persists in the attempt, and thus contributes to the accident, even if the company is guilty of negligence in moving the train with a jerk which concurs in producing the injury. So in *Griswold v. Chicago etc. R'y Co.*, 64 Wis. 652, a person who was not a passenger boarded a railroad train to assist his wife, who was a passenger, to alight. While he was upon the car platform the train suddenly started, throwing him therefrom and injuring him. Before the train started, all the passengers for that station, including his wife, had alighted, and all outgoing passengers had boarded the train. How long the train stopped, and whether any signal was given for starting, were matters not clearly shown by the evidence, and the court determined that the company was not liable for the

injury, as none of the employees of the company knew that the person injured expected to go upon that train to assist a passenger, or that he had done so, while a brakeman knew that the wife had left the train and needed no assistance. The case of *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371, seems to militate against this view somewhat, in holding that where a person, not a passenger, gets on a railroad train to find seats for a lady and child in his charge, and after finding the seats, is injured while attempting to leave the train after it has started, the company is liable in damages, if no sufficient notice of the start and a reasonable time to alight from the train are given. This case, however, was made to depend upon the negligence of the company in not stopping at the proper place long enough for the lady passenger and the child to get on the train, so that her lawful escort was injured in getting off. Having notice of the passenger, the company had the same notice of her escort. The case is an extreme one, and in conflict with the current of authority upon the subject, and it does not dispense with notice to the company of the presence of the escort, while the company was guilty of negligence in starting the train too soon. Another case opposed to the general doctrine is that of *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, where it was decided that when a passenger is sick, and so enfeebled as to require assistants to carry him from the station to a seat in the train upon which he has secured passage, the railroad company, having contracted to carry him with knowledge of his condition, is under obligation to hold the train long enough to allow the assistants a reasonable time to leave it, the same as though they were passengers, although they volunteered their services, and that it was liable for an injury sustained by one of them in attempting to leave the train after it was in motion, before he had a reasonable time to get off, and in suddenly increasing the speed of the train while he was in the act of alighting. This case stands by itself in holding that a railroad company owes the same duty to one assisting a passenger that it does to the passenger himself. It is opposed to the cases which have come under our observation, and cites no authority in support of the ruling. Besides, in that case, the railroad company, through its conductor, either knew, or should have known, from what he saw, that the invalid passenger came on board the train only by the aid of attendants; and it cannot be seriously doubted, under a majority of the cases, that when the company has knowledge or notice that a person boards a train merely for the purpose of assisting a passenger, it is bound to hold its train a reasonable time to enable him to fulfill his mission and alight without injury, or respond in damages for its neglect of duty toward him.

Duty to Keep Station Safe. — The rule is well settled that railroad companies are bound to make and keep their stations, station platforms, and approaches thereto safe for persons going there to assist passengers, or to receive or part with them. To all such persons the company is under the same obligation to exercise extraordinary care that it owes to its passengers: *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; *Hamilton v. Texas etc. R'y Co.*, 64 Tex. 251; 53 Am. Rep. 756; *Texas etc. R'y Co. v. Best*, 66 Tex. 116; *McKone v. Michigan etc. R. R. Co.*, 51 Mich. 601; 47 Am. Rep. 596; *Tobin v. Portland etc. R. R. Co.*, 59 Me. 183; 8 Am. Rep. 415. The rule is thus announced in *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317: Persons who come upon a railroad platform to welcome a coming or to speed a parting guest are there by authority of the company, as much as a passenger, and as to them, the platform must be strong enough to sustain them, no matter how numerous, or the company must respond in dam-

ages for injury to them caused by its defects. In *Hamilton v. Texas etc. R'y Co.*, 64 Tex. 251, 53 Am. Rep. 756, the court, after affirming the doctrine above set forth, said: "If the infirmities of passengers to go on the train required the assistance of friends to see them safely on board, servants or friends attending them for that purpose would clearly be in attendance at the depot under an invitation of the company as direct as that given to the passengers themselves." Where a hackman, accustomed to carry passengers to and from a railway depot, was injured by a defect in the platform, he was held entitled to recover, on the ground that he was there by the license and permission of the railroad company, and by the accommodation afforded by him to passengers and travelers actually contributed to help the business of the company: *Tobin v. Portland etc. R'y Co.*, 59 Me. 183; 8 Am. Rep. 415. A railroad company is liable in damages, where a person, waiting at its depot for his wife, whom he expects by train, having a special occasion to leave the depot, in doing so steps off a walk on the depot grounds in the dark, and falls into a hole, receiving the injury complained of, without fault on his part: *McKone v. Michigan etc. R. R. Co.*, 51 Mich. 601; 47 Am. Rep. 596.

McLAUGHLIN v. McCrory.

[56 ARKANSAS, 442.]

JUDGMENTS AGAINST NON-RESIDENTS BY PUBLICATION. — A state possesses the power to provide for the adjudication of land titles within its limits, as against non-residents who are brought into court only by publication, even though a court of equity where the defendant is found might be competent to force him to execute a release of his claim of title.

EQUITY — JURISDICTION IN REM. — Courts of equity may be empowered by statute to annul deeds for fraud, and to establish titles to lands within their jurisdiction by mere force of their decrees, and to that extent their action is *in rem*.

ACTION — WHEN LOCAL. — **SUIT IN EQUITY TO CANCEL DEED FOR FRAUD**, and to revest the title, is, under the Arkansas statute, a proceeding *in rem* "for the recovery of real property," etc., and must be brought in the county where the land lies.

EQUITY — JURISDICTION IN REM — CONSTRUCTIVE SERVICE. — A suit in equity to cancel a deed for fraud is, under the Arkansas statute, a proceeding *in rem*, and may be prosecuted against a non-resident by publication of summons.

J. C. Hawthorne, for the petitioner.

W. R. Coody, for the appellee.

COCKRILL, C. J. This is a petition to this court for a writ of *certiorari*, presented by McLaughlin, to quash a judgment against him, rendered by the Woodruff circuit court. McCrory was the judgment plaintiff. He filed his complaint against McLaughlin, alleging that the latter had obtained from him, through fraud, a deed to lands lying in Woodruff County, of which he, McCrory, was the owner.

The facts in relation to the fraud were specifically set forth. It being made to appear that McLaughlin was a non-resident of the state, he was summoned by warning order. He failed to appear; the court found that the allegations of the complaint were true; adjudged the cancellation of the deed which McCrory had executed, and that the title be revested in him. McLaughlin now seeks to quash that judgment, arguing that the court could act *in personam* only in canceling his title, and that as it did not have jurisdiction of his person, the judgment is void. To sustain that contention, he relies upon the case of *Hart v. Sansom*, 110 U. S. 151. The *syllabus* of that case is misleading. It is to the effect that "a decree of a state court for the removal of a cloud upon the title of land within the state, rendered against a citizen of another state, who had been cited by publication only, as directed by the local statutes, is no bar to an action" by the non-resident defendant to recover the land in ejectment from the plaintiff in the suit prosecuted upon service by publication.

The conclusion announced in the *syllabus* is correct only where there is an absence of legislation conferring power upon the courts where the lands lie to exercise jurisdiction upon citation by publication as in the nature of a proceeding *in rem*. Anciently, courts of equity exercised jurisdiction exclusively over the person of the defendant, refusing to interfere with or act upon the *corpus* of his estate: *Pickett v. Ferguson*, 45 Ark. 212; 55 Am. Rep. 545. It is not probable that any such court is now so confined in its jurisdiction. If, however, the court which enters the decree in a given case is authorized to act therein *in personam* only, it acquires no jurisdiction by publication to grant relief. That is well settled, and that is the full extent to which it can be said the authority of the decision goes in *Hart v. Sansom*, 110 U. S. 151.

Judge Brewer reviews the cases upon this subject, in *Arndt v. Griggs*, 134 U. S. 316, and announces for the court that the decisions of the supreme court of the United States coincide with the decisions of the various state courts in maintaining that a state possesses the power "to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication," even though a court of equity where the defendant is found might be competent to force him to execute a release of his claim of title. That is the settled law. If it be conceded, then, that a suit to set aside a deed upon the ground that it was

obtained by fraud is one that a court of equity could entertain by acting upon the person of the party who committed the fraud without regard to the *situs* of the land, it is only necessary to ascertain whether the Woodruff circuit court has been empowered to divest title by force of its decree upon citation by publication.

Since 1837 the following provisions, found in Mansfield's Digest, have been the law of this state: "In all cases where the court may decree the conveyance of real estate or the delivery of personal property, they (it) may, by decree, pass the title of such property without any act to be done on the part of the defendant, where it shall be proper, and may issue a writ of possession, if necessary, to put the party in possession of such real or personal property, or may proceed by attachment or sequestration": Sec. 3953. "When an unconditional decree shall be made for a conveyance, release, or acquittance, and the party required to execute the same shall not comply therewith, the decree shall be considered and taken to have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably to the decree": Sec. 3954.

So far, then, from being confined to acting *in personam*, the courts of this state are empowered to annul a deed and establish title to lands within their jurisdiction by mere force of their decrees. To that extent their action is *in rem*: *Jones v. Fletcher*, 42 Ark. 422, 446, 447.

The Code of Civil Procedure contemplates that every action which can be maintained by personal service of process may be maintained against a non-resident by publication, if property can be found upon which to exercise jurisdiction. It abolishes all forms of action (Mansfield's Digest, secs. 4914, 4915), and provides generally that a civil action may be commenced by filing a complaint and issuing a summons for personal service, or by publishing a warning order where the defendant is a non-resident: Secs. 4967, 4975, 4989. If constructive service is resorted to, the action may be brought in any county where property of the defendant is found, unless it is one of the actions made local by the statute: Sec. 5005. Among these are actions "for the recovery of real property, or of an estate or interest therein," which must be brought in the county where the land lies: Sec. 4994. Now, if it be true that a court of equity may cause a deed to be canceled by acting *in personam*, as in a transitory action, it is certain that when

it attempts to accomplish that result by the force of its own decree, it acts *in rem*: *Jones v. Fletcher*, 42 Ark. 422. That is the common reason given for defeating the decree in those cases where the court, having jurisdiction of the person of a defendant, attempts, by the mere force of its decree, to divest his title to lands lying beyond its jurisdiction, — as in another state. In such a case, the decree cannot have effect, because the land which it purports to act upon is not within the jurisdiction of the court: *Carpenter v. Strange*, 141 U. S. 87; *Arndt v. Griggs*, 134 U. S. 316; *Davis v. Headley*, 22 N. J. Eq. 115; *Cooley v. Scarlett*, 38 Ill. 316; 87 Am. Dec. 298; *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621. Because the decree in this case does operate upon the land, the action was local, and comes within the meaning of and is controlled by the section of the statute last quoted. In the case of *Jones v. Fletcher*, 42 Ark. 422, it was ruled that that section is broad enough to cover all actions at law or in equity, where the judgment or decree is to operate *in rem*.

As the court was empowered to cancel a deed obtained by fraud by acting upon the land, and as the statute authorizes the prosecution of an action for that purpose against a non-resident by publication, nothing is wanting to sustain the decree in question. The petition must therefore be dismissed.

PROCESS — SERVICE OF, ON NON-RESIDENT DEFENDANTS BY PUBLICATION. — A decree against a non-resident defendant, based upon service of process by publication, in an action to determine conflicting claims to realty situated within the state, is valid. The state has the power to provide for the determination of such claims and to authorize such service of process: *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67, and note; see note to *Young v. Upshur*, 21 Am. St. Rep. 384. An action to cancel a deed as fraudulent is a suit for the establishment of a right to or against real estate, so as to permit notice to non-resident defendants to be given by publication of summons: *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74, and note.

ACTIONS — WHEN LOCAL. — Local actions consist generally of those instituted for the recovery of real estate, or for injuries thereto, or for easements: *Morris v. Missouri Pac. R'y Co.*, 78 Tex. 17; 22 Am. St. Rep. 17, and extended note.

EQUITY — JURISDICTION TO CANCEL DEED FOR FRAUD. — A court of equity will set aside a conveyance at the instance of a grantor, if the parties did not stand on an equal footing, and the conveyance was procured through the false representations of the grantee: *Harper v. Harper*, 85 Ky. 160; 7 Am. St. Rep. 583, and extended note; *Du Pont v. Du Bos*, 33 S. C. 389. To order the cancellation of a void deed, equity has jurisdiction: *Jones v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430. Equity will decree the cancellation of a forged deed: *Leigh v. Everheart*, 4 T. B. Mon. 379; 16 Am. Dec. 160.

BANK OF LITTLE ROCK v. McCARTHY.

[55 ARKANSAS, 473.]

CORPORATIONS — NOTICE OF MEETING OF DIRECTORS — NECESSITY FOR. —

A mortgage of the property of a corporation authorized by a majority of its directors at a meeting of which a temporarily absent director had no notice is neither valid nor binding, in the absence of proof that it was impracticable to give him notice, and that an emergency and actual necessity demanded the immediate execution of the mortgage.

CORPORATIONS — NOTICE OF MEETING OF DIRECTORS — WHEN CAN BE DIS-

PENSED WITH. — Notice to all the directors of a corporation of a business meeting thereof is generally necessary to its validity, and can only be dispensed with when it is impracticable to give such notice to the minority in a case of emergency, and when the act done in the absence of one or more of them not served with notice clearly appears to be reasonably necessary as well as proper to the welfare of the corporation.

CORPORATIONS — NOTICE OF MEETING OF DIRECTORS — SUFFICIENCY OF. —

In the absence of statutory or corporate regulation as to the mode of giving notice of the meetings of the directors of a corporation, personal notice must be given to each director, and written notice of a meeting left at a director's usual place of business, at a time when he and his family are absent to remain until after the time fixed for the meeting, is insufficient as notice to him, and renders the meeting held in his absence unlawful.

W. S. McCain, and U. M. and G. B. Rose, for the appellant.

Sanders and Watkins, and W. L. Terry, for the appellees.

HEMINGWAY, J. The Bratt Lumber Company was a corporation organized under the laws of this state to conduct a milling and lumber business. Its stockholders were J. A. Bratt, J. H. Trump, W. H. Crawford, Leonard Bratt, and C. B. Field; the board of directors was composed of the same persons, with J. A. Bratt as president, and Field as secretary and treasurer. About the first day of August, 1889, the company owed McCarthy and Joyce about twenty-five thousand dollars, and the Bank of Little Rock the same sum. It was in debt to its employees and other persons in amounts aggregating about six thousand five hundred dollars. The Bratts and Trump live at Malvern, the principal place of business of the company, Crawford lived in Indiana, and Field resided in the city of Little Rock, where he had an established residence and a place of business. At that time, Field left the state to be absent for a while, stating to Bratt, the president, that he would return in a few days and provide means to pay the pressing debts of the company. Field not returning in time to provide for such demands, Bratt inquired of the person in charge of his office in Little Rock to learn where he was, and was in-

formed that he was stopping at the Tremont House, in the city of Chicago. Bratt then went to Kansas City, where the company made sales of lumber, for the purpose of collecting the proceeds of such sales to meet the company's liabilities; finding that the sales were confused with sales made by other companies of which Field was an officer, and that he could collect nothing on that account, he proceeded to Chicago for the purpose of seeing Field. On his arrival he found that Field had left Chicago, and being unable to learn his whereabouts, Bratt returned to Little Rock without having obtained the desired funds. He then applied to McCarthy and Joyce to lend him the amount needed; they declined to do so unless he would secure their old debt, as well as the sum to be loaned, by a mortgage on the company's property, but offered to lend him ten thousand dollars upon condition that such security be given. Bratt agreed to give the mortgage as requested, if arrangements for its execution could be made. After a conference with McCarthy and Joyce, and their attorney, it was agreed that Bratt should call a meeting of the board of directors for the purpose of considering whether the company should mortgage its property to them for the purpose of securing their past indebtedness, and a loan to be made of ten thousand dollars. Notices of the meeting were prepared and served on all the directors except Field. Bratt again inquired at Field's office to learn where he was, and was told that if he was not in Chicago, the person in charge of the office did not know where he was. Accordingly, on the 29th of August, 1889, Bratt went with a notice of the meeting to Field's residence, and finding no one there, inserted it between the door and the casing, and thus left it. Field's family were then absent from the city, and the residence was unoccupied, except by a man who slept there; the notice left at his house was not received by him. On the 31st of August, a meeting of the directors was held in pursuance of the notice, all the members being present except Field, and an order was made by a vote of three to one in favor of making the mortgage to McCarthy and Joyce. In pursuance thereof, a mortgage was shortly executed, covering about all of the company's assets, for the purpose of securing the existing debt to McCarthy and Joyce, and also the sum of ten thousand dollars to be advanced by them. On the same day, Trump, the dissentient director, filed the complaint in this case, alleging the indebtedness to McCarthy and Joyce, and to the bank, as well as the execution of the

mortgage, and that the affairs of the company were being extravagantly and wastefully conducted, and asking that the court appoint a receiver to take charge of its assets and conduct its business. The company, the bank, and McCarthy and Joyce were made defendants, and upon an application in vacation, the chancellor granted the application for a receiver. McCarthy and Joyce filed an answer and cross-bill, the material feature of which was a prayer for the foreclosure of their mortgage. The bank also filed an answer and cross-bill, the material features of which were allegations that the mortgage to McCarthy and Joyce was void (for the reason, among others, that the meeting at which it was authorized was not a lawful meeting of the board, Field having no notice thereof and not being present), and a prayer that the assets of the company be ratably distributed among its creditors. The assets were, by consent of all parties, converted into money, which was to be held in lieu thereof, subject to the determination of this cause. The cause came on to be finally heard upon the pleadings and proofs, and the court dismissed the cross-bill of the bank, and entered a decree in accordance with the prayer of McCarthy and Joyce. The bank appealed.

The assets realized, when sold, twenty-five thousand dollars, in round numbers, and as the debts more than doubled that sum, it is evident that the company was insolvent. There was nothing in the articles or by-laws of the company fixing the time for regular meetings of the board of directors, and no provision for calling special meetings. McCarthy and Joyce advanced nothing upon the ten-thousand-dollar loan provided for in the mortgage, and claim under the mortgage a security for the past debt only. It does not appear that the board of directors ever attempted to hold a meeting after the day when the mortgage was executed.

The two questions which we have deemed it necessary to consider are: 1. Was it necessary to the validity of the directors' meeting that Field should have notice thereof? and if so, 2. Was he notified?

Counsel have argued other questions with ability and learning, which merit praise and commendation. But however interesting we might find that field to which we are invited, the demands that a crowded docket asserts upon our time forbid that we follow them further than is necessary to dispose of this case. We dismiss, therefore, the other matters argued, and proceed to the consideration of the questions stated.

The statute provides that the stock, property, affairs, and business of business corporations shall be managed by not less than three directors: Mansfield's Digest, sec. 964; and further, that a majority of the directors, convened according to the by-laws, shall constitute a quorum for the transaction of business: Sec. 969.

In the case of *Simon v. Sevier Ass'n*, 54 Ark. 58, the validity of a general assignment authorized by a majority of the directors at a meeting of which the absent directors had no notice was considered, and we held that the statute authorized a majority to act only at a meeting legally convened, and that it was essential to a legal meeting that it be called in accordance with the by-laws or rules of the corporation, or upon due and legal notice given to each of the members. There was no contention that notice could not have been served on each member, and no expression of the law, where that was a fact.

Subsequent investigation has not altered our views as then expressed, but we are convinced that they are in a line with the authority of text-writers and adjudged cases. If the rule were otherwise, the rights and interests of minority holders would be liable to great abuse. Even majorities might suffer; for, by absence of some of their number, the minority might become the majority, hold a meeting without notice to the absentees, and change the entire course or policy of the business, or do acts destructive to its prosperity or future existence. Such abuse of corporate power is not unknown to the history of corporations, and its evidence is found in the records of the courts. Rules intended to check or prevent it should be rigidly observed, except where reason requires that they be relaxed. The wisdom of the rule and the dangers incident to any other are very clearly stated by Judge Brewer in the case of *Paola etc. R'y Co. v. Comm'rs of Anderson Co.*, 16 Kan. 309, where he shows that if any other rule prevailed, it would be possible, with a board composed of twelve members, for four directors to convene a meeting of seven by giving notice to three and withholding it from five others, and to bind the corporation to acts condemned by eight. That case called for no expression as to the law in cases of emergency where notice to any director was impracticable, and contains no discussion of such cases, but there is an intimation that the rule might admit exceptions in such cases.

That such cases may arise as will justify and require exceptions to be made is a conclusion to which reflection in-

evitably leads. In fact, it is conceded by the learned counsel for the appellant "that a director cannot put a stop to corporate business by simply leaving its jurisdiction"; and that "if after a reasonable search the parties are unable to find him, the remaining directors may attend to the necessary affairs." This indicates that the exception arises upon a concurrence of three conditions: 1. The impracticability of notice; 2. The existence of an emergency for action; and 3. A reasonable necessity for the action taken.

Without committing the court to a full approval of this form of stating the exception, we may say that it seems to be substantially correct. Where notice is practicable, it must be given; it can be dispensed with, when impracticable, only to meet an emergency; and the act done must appear reasonably necessary to the welfare of the corporation. If the act is merely proper, but not necessary, or if it appear that it may become necessary, but the necessity is not present, the rule should not yield; for in such cases notice may become practicable, and the presence of the absent director be secured, before the necessity arises or the emergency is present. Such we consider the rule deducible from the case of *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, relied upon by the appellee. For it had been held in earlier decisions of that court that a meeting attended by a majority of the directors, of which the minority had no notice, was not lawful, and it does not appear that there was any intention to overrule those decisions: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99. The learned judge who delivered the opinion in that case says that "the exigency demanded immediate action to save the property and to save expense," and the action of the meeting was upheld, upon the ground that power must be accorded the company to protect itself.

The case of *Halifax S. R'y Co. v. Francklyn*, 8 R'y & Corp. L. J. 91, is not before us; but, as quoted in *Beach on Corporations*, 473, it does not seem to go as far as the last case. It is there said that a meeting to borrow money could not be held without notice to all the directors, even where some of them were in foreign countries; but a meeting to perfect debentures previously given was justified, because the action came within the ordinary business transacted by the company. We cannot say with confidence, without an examination of the case, what was decided; but it seems that the act alone was regarded as within the ordinary line of the company's business, and it

may be that it was considered to be such as the managing officers of the company were authorized to do without express authority from a board meeting.

The other cases cited by appellee seem to hold that if a majority attend the meeting, notice to the minority is unnecessary: *Edgerly v. Emerson*, 23 N. H. 569; 55 Am. Dec. 207; *Bank v. Flour Co.*, 41 Ohio St. 558.

They are cited by the text-writers as against the current of authority: 1 Beach on Corporations, sec. 279, note; 1 Morawetz on Corporations, sec. 532, note 1. We are of the same opinion; and as they conflict with the rule announced in former decisions of this court, we cannot follow them: *School Dist. v. Bennett*, 52 Ark. 511; *Simon v. Sevier Ass'n*, 54 Ark. 58; *Paola etc. R'y Co. v. Comm'rs of Anderson Co.*, 16 Kan. 309; *Baldwin v. Canfield*, 26 Minn. 43; *Harding v. Vandewater*, 40 Cal. 77; *Chouteau Ins. Co. v. Holmes's Adm'r*, 68 Mo. 601; 30 Am. Rep. 807; *Stevens v. Eden Meeting-house Soc.*, 12 Vt. 688; *Gordon v. Preston*, 1 Watts, 385; 26 Am. Dec. 75; *Jackson v. Hampden*, 16 Me. 186; *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66; *State v. Ferguson*, 31 N. J. L. 107; *Pike Co. v. Rowland*, 94 Pa. St. 238; *Covert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319.

It is next insisted that the making of a mortgage is an ordinary business act, and therefore may be authorized at a meeting of a majority of the directors, without notice to the minority.

We do not deem it necessary to enter into a discussion as to what are ordinary and what are extraordinary acts of a corporation. If by "ordinary acts" is meant such as may be done by the managing officers without authority from a board meeting, we agree that they may be ordered at a meeting of a majority without notice to the minority; but if such acts are intended as can be done only under authority from a board meeting, we cannot accept the principle as correct. For whatever requires the sanction of a meeting must be authorized by a lawful meeting, for the directors can act as a board at no other. No managing officer claimed the authority to execute the mortgage in this case, and none is shown to have existed, and it is unnecessary for us to consider whether the making of a mortgage covering the bulk of the assets comes within the power usually conferred on a general manager.

If notice can be omitted only where it is impracticable to give it, and an emergency demands the immediate doing of the act to be authorized, the question is, Was the meeting re-

lied upon in this case lawful without notice to Field? The act encumbered the bulk of the company's assets to secure a past debt, and also a contemplated loan which was never made. Was it necessary that the company do that act for its protection? The question carries the answer. If we concede that it was necessary to procure money in order to conduct the corporate business, no necessity appears for encumbering its assets to secure the existing debt. It is not shown that efforts were made to borrow the requisite amount from other persons; and for aught that appears, if they had been made, it could have been borrowed. If it could, there was no necessity to make the mortgage to secure the old debt. If it was necessary to secure the old debt in order to borrow the sum needed, that should have been established; for as the mortgagees seek to bring themselves within the exception to the rule, the burden is upon them to prove the facts that justify an exception. Finding no exigency that demanded the making of the mortgage to secure the old debt, we are of opinion that a meeting to authorize it could not be held without notice to Field.

There is no ground to contend that notice to him was unnecessary because he had abandoned the office, for everything indicated that his absence was temporary, and he in fact returned the next day.

Was the notice left at his usual place of residence, at a time when he and his family were absent to remain until after the time fixed for the meeting, notice to him? Counsel insist that it constituted notice, and to sustain their position cite us to section 5206 of Mansfield's Digest; but that section has reference to notices mentioned in the code, and as notices to directors of business corporations are not included in such mention, we think the section inapplicable. The law provides for no constructive notice in such cases, and in the absence of such provision, notice must be personal. Such seems to be the rule established by the authorities: 1 Beach on Corporations, sec. 281; *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99, and note 102, 103; *Covert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319; 1 Waterman on Corporations, sec. 63, p. 205; 1 Morawetz on Corporations, sec. 531; *Stevens v. Eden Meeting-house Society*, 12 Vt. 688; *Harding v. Vandewater*, 40 Cal. 77.

There are statements in text-books and adjudged cases to the effect that where the director is absent notice may be left at his usual place of abode; but they either grow out of the provisions of statutes or by-laws providing for such notice, or

are found in cases where the manner of giving notice was not involved, but only the question was as to the necessity for notice.

Under the first head may be cited 1 Dillon on Municipal Corporations, sec. 263, and *Lord v. Anoka*, 36 Minn. 176; and under the second, 1 Waterman on Corporations, 206, and *Jackson v. Hampden*, 20 Me. 37.

There being nothing in our statutes, or in the by-laws or regulations of the corporation, providing for any other than personal notice, we think none other would answer. As a notice to Field was necessary to authorize a meeting, and as none was given, we think it was not a lawful meeting, and the mortgage was not the act of the corporation. McCarthy and Joyce were not entitled, therefore, to all the money arising from the sale, but the same should have been distributed among the creditors of the corporation in accordance with law.

Judgment reversed, and cause remanded for proceedings in accordance with law.

CORPORATIONS — NOTICE OF MEETING OF DIRECTORS — NECESSITY FOR. — Each director must, under the provisions of the Civil Code of California, have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings: *Thompson v. Williams*, 76 Cal. 153; 9 Am. St. Rep. 187, and note. The act of a majority of the directors of a corporation, to be of any effect, must have been expressed at a regular notified meeting at which all of the directors might have been present: *Elliot v. Abbot*, 12 N. H. 549; 37 Am. Dec. 227; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; extended note to *Stow v. Wyse*, 18 Am. Dec. 99; *Metropolitan Telephone etc. Co. v. Domestic Telegraph etc. Co.*, 44 N. J. Eq. 568. A corporation is bound, where a quorum of the directors meet and unite in any determination, whether the other directors are or are not notified, and although the meeting was not a general meeting: *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207, and note.

CORPORATIONS — NOTICE OF DIRECTORS' MEETING — SUFFICIENCY OF. — Acts done at a corporation meeting, of which notice was not given in the manner prescribed by its charter or by-laws, are void, and where no mode of giving notice is prescribed, personal notice must be given: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99, and note.

THOMAS v. KINKEAD.

[55 ARKANSAS, 502.]

HOMICIDE BY OFFICER TO PREVENT ESCAPE OF MISDEMEANANT. — Where one accused of misdemeanor has been arrested and is fleeing, a peace-officer is not justified in killing him to prevent his escape, although no other means of prevention are available.

HOMICIDE BY OFFICER TO PREVENT ESCAPE OF FELON. — A peace-officer is justified in killing a person arrested for felony who is fleeing to escape, if no other means of prevention are available.

MISDEMEANOR — ARREST OR ESCAPE — RIGHTS OF OFFICER. — A peace-officer, in making an arrest for misdemeanor or preventing the escape of the misdemeanant, may exert such physical force as is necessary to effect his purpose, but he is not justified, in either case, in taking the life of the accused, nor can he inflict upon him great bodily harm, except to save his own life, or prevent a like harm to himself.

T. J. Oliphint, for the appellants.

Ratcliffe and Fletcher, for the appellees.

MANSFIELD, J. This action was brought by the widow and minor children of John Thomas, deceased, against Ewing Kinkead, a constable of Pulaski County, and the sureties on his official bond, to recover damages for the alleged wrongful killing of Thomas by Jesse F. Heard, a deputy of the defendant Kinkead as such constable. Heard was also made a defendant. The complaint avers that the act of killing was committed under cover of a warrant for the arrest of Thomas, to answer for a misdemeanor charged against him before a justice of the peace, and that it was done wantonly and without cause.

The defendants, by their pleading, justify the killing as having been done by Heard in self-defense, while lawfully exercising his power to execute the warrant mentioned in the complaint, and while Thomas was unlawfully resisting arrest and attempting to escape. The appeal is from a judgment rendered on the verdict of a jury against the plaintiffs.

The death of Thomas resulted from a wound inflicted by a pistol-shot, and the evidence as to the immediate circumstances of the homicide was such as to make it questionable whether he had been actually placed under arrest before he was shot. It was contended at the trial that his arrest had been accomplished, and that he was killed while attempting to break away from the custody of the officer. As applicable to this view of the facts, the court, against the objection of the plaintiffs, gave the jury the following instruction: "If the jury

find from the evidence that Heard had actually arrested Thomas, whether for felony or misdemeanor, if Thomas attempted to get away, Heard had a right to shoot him, if this shooting was necessary to prevent his escape, provided Heard acted in the exercise of due caution and prudence."

In repeating substantially the same charge in a different connection, the jury were told that life can be taken to prevent an escape only in case of extreme necessity, and when the officer has exhausted all other means of enforcing the prisoner's submission. The duty which the law enjoins upon an officer to exercise his authority with discretion and prudence was also fully and properly stated, and the jury were, in effect, instructed that the needless killing of a prisoner would in all cases be wrongful. In another part of the charge, it was stated, as an admission of the pleadings, that the offense of which Thomas was accused was a misdemeanor. And in other respects the charge of the court was such that the plaintiffs were not prejudiced by the instruction we have quoted, if the life of a prisoner may be taken under any circumstances merely to prevent his escape after arrest for a misdemeanor.

The doctrine of the court's charge is approved by Mr. Bishop, who states it, in his work on criminal procedure, substantially in the language employed by the trial judge: 1 Bishop's Crim. Proc., sec. 161. In his note on the section cited, the author refers to his work on criminal law (vol. 2, secs. 647, 650) and to two cases decided by the supreme court of Texas: *Caldwell v. State*, 41 Tex. 86, and *Wright v. State*, 44 Tex. 645. In the first of these cases, a prisoner who had been arrested for horse-stealing broke away from the custody of the officer, and the latter shot and killed him as he ran in the effort to make his escape. It was held that the officer was rightfully convicted of murder in the second degree, — the evidence showing that the prisoner was unarmed and neither attacking nor resisting the officer. The judge who delivered the opinion said: "The law places too high an estimate upon a man's life, though he be . . . a prisoner, to permit an officer to kill him while unresisting, simply to prevent an escape." But as the arrest was for a felony, it may be that the decision was controlled by a statute of that state which provides that an "officer executing an order of arrest shall not in any case kill one who attempts to escape, unless, in making or attempting such escape, the life of the officer is endangered, or he is threatened with great bodily injury." However that may

have been, the case gives no support to the text in connection with which it is cited. Nor is such support to be found in the case of *Wright v. State*, 44 Tex. 645, where the decision was, that the power conferred by a Texas statute upon an officer having the custody of a convicted felon to take the life of the prisoner to prevent his escape does not extend to an officer attempting to rearrest an escaped convict.

The rule laid down without qualification in Criminal Procedure is stated only as "a general proposition" in one of the sections referred to in the work on criminal law. From the text of the latter, reference is made to the treatise of Russell on Crimes and to the earlier works of Hale and Hawkins. But these writers all appear to limit the application of the rule to cases of felony, or to cases where the jailer or other officer having the custody of a prisoner is assaulted by the latter in his effort to escape, and the officer kills him in self-defense: 1 Hale P. C. 481, 496; 1 Russell on Crimes, 666, 667; 1 Hawk. P. C. 81, 82. The decisions cited by Mr. Bishop in the section last referred to, as far as we have had the opportunity to examine them, go no further than the authors we have mentioned: *United States v. Jailer etc.*, 2 Abb. 265; *State v. Anderson*, 1 Hill (S. C.) 327; *Regina v. Dadson*, 14 Jur. 1051. See also 4 Bla. Com. 180.

The case of *State v. Sigman*, 106 N. C. 728, is relied upon as sustaining the instruction in question. In that case an officer was indicted for an assault with a deadly weapon, committed by discharging a pistol at a person accused of a misdemeanor, and who had escaped from the officer's custody and was fleeing to avoid rearrest. The officer, being unable to overtake the prisoner, fired upon him. He was convicted, and the judgment of the trial court was affirmed, the supreme court holding that the defendant was guilty of an assault, whether his intention in firing was to hit the escaped prisoner, or simply to intimidate him, and thereby induce him to surrender. This ruling followed as a conclusion from two propositions stated in the opinion. These are: 1. That an officer who kills a person charged with a misdemeanor, and fleeing from him to avoid arrest, will at least be guilty of manslaughter; 2. That where a prisoner "has already escaped," no means can be used to recapture him which would not have been justifiable in making the first arrest; and that if in pursuing him the officer intentionally kills him, it is murder. But the second proposition is preceded by the following paragraph of

the opinion, upon which the appellees specially rely: "After an accused person has been arrested, an officer is justified to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary, whether he be charged with a felony or a misdemeanor"; citing the first volume of Bishop on Criminal Procedure. The view thus expressed does not appear to be consistent with the court's decision. Nor does it seem to be an unqualified approval of the rule as it is stated in Bishop on Criminal Procedure. As stated in the quotation made, it seems to be laid down with reference only to cases where a prisoner resists by force the effort of the officer to prevent him from "breaking away," and is killed in the struggle or affray which follows. In the case then before the court, the prisoner had entirely escaped, and having been subsequently found, had run some distance before he was shot at. There was no occasion, therefore, for deciding whether the shooting, although not in self-defense, would have been justifiable if it had been done in an effort to detain the prisoner in the officer's custody. But we are wholly unable to perceive any ground for a distinction between the latter case and that on which the court's ruling was made. In a paragraph of the opinion preceding that from which we have quoted, in speaking of a case of one who, being charged with a misdemeanor, flees from the officer to avoid arrest, the court said: "The accused is shielded, . . . even from an attempt to kill, . . . by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offense, when it is probable that he can be arrested another day and held to answer." This humane principle was permitted to prevail against the officer in the case decided, although the person assaulted had been arrested, and was shot at in the endeavor made to rearrest him. Why should it not also protect the life of the prisoner arrested on a similar charge who endeavors forcibly to break away from the officer, but offers no violence to the latter endangering his life or exposing his person to great harm?

The case of *Head v. Martin*, 85 Ky. 480, is also cited by the appellees. But the only ruling there made, as indicated by the *syllabus*, was, that a peace-officer, having arrested one accused of a misdemeanor, cannot, when he is fleeing, kill him to prevent his escape; and all that the court says is strongly against the contention of the appellees on the point we are con-

sidering. On the point embraced in the quotation of counsel from the opinion in that case, the jury in the present case were properly charged by instructions other than that now under consideration. The only question presented by the latter is, whether an officer, having in his custody a prisoner accused of a misdemeanor, may take his life if he attempts to break away, where, in the language of the court's charge, "no other means are available" to prevent his escape. A resort to a measure so extreme in cases of misdemeanor was never permitted by the common law: 1 East P. C. 302. That law has not, it is believed, lost any of its humanity since the time of the writer we have just cited; and no statute of this state operates to restrain its mercy. We have adopted its rule in making arrests in cases of felony: *Carr v. State*, 43 Ark. 99. But without legislative authority, the severity of a remote age ought not to be exceeded in dealing with those who are accused of smaller offenses.

East, in his *Pleas of the Crown*, after stating the rule that a felon fleeing from justice may be lawfully killed, "where he cannot be otherwise overtaken," says: "The same rule holds if a felon after arrest break away as he is carrying to jail, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him": 1 East P. C. 298. No distinction, it will be noticed, is made between the case of a felon fleeing from arrest and that of one "breaking away" after arrest; and such is still the law. No reason whatever is given for making such a distinction in cases of misdemeanor, and we have found no adjudged case which, in our opinion, supports it: See *Clements v. State*, 50 Ala. 117; *Head v. Martin*, 85 Ky. 480; *Reneau v. State*, 2 Lea, 720; 31 Am. Rep. 626.

In *United States v. Clark*, 31 Fed. Rep. 710, Mr. Justice Brown says: "The general rule is well settled, by elementary writers upon criminal law, that an officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor, the theory of the law being, that it is better that a misdemeanant escape than that human life be taken." And he expresses a doubt whether the law permitting life to be taken to prevent an escape is applicable at the present day even to all cases of felony. See also *State v. Bryant*, 65 N. C. 327; *Reneau v. State*, 2 Lea, 720; 31 Am. Rep. 656.

It has been said that the officers of the law are "clothed with its sanctity" and "represent its majesty": *Head v. Martin*, 85 Ky. 483. And the criminal code has provided for the punishment of those who resist or assault them when engaged in the discharge of their duties: Mansfield's Digest, secs. 1765-1767. But the law-making power itself could not, under the constitution, inflict the death penalty as a punishment for a simple misdemeanor: Const., art. 2, sec. 9. And it would ill become the "majesty" of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine. It is admitted that an officer cannot lawfully kill one who merely flees to avoid arrest for a misdemeanor, although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid his hands upon him with words of arrest, he may do so without danger to his life. But if, by surprise or otherwise, he be for a moment sufficiently restrained to constitute an arrest, and then "break away," the officer may kill him if he cannot overtake him. Such is the effect of the argument and of the rule in support of which it is made. We can see no principle of reason or justice on which such a distinction can rest, and we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. In making the arrest or preventing the escape, the officer may exert such physical force as is necessary, on the one hand, to effect the arrest by overcoming the resistance he encounters, or on the other, to subdue the efforts of the prisoner to escape; but he cannot, in either case, take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life, or to prevent a like harm to himself.

The circuit court erred in so much of its charge as was not in harmony with this statement of the law. In other respects the instructions contain no error prejudicial to the appellants. For the error indicated, the judgment will be reversed, and the cause remanded for a new trial.

HOMICIDE — KILLING OF FLEEING FELON BY OFFICER. — Under the common law and the Mississippi code, it is lawful to kill a fleeing felon when he cannot be taken otherwise: *Jackson v. State*, 66 Miss. 89; 14 Am. St. Rep. 542, and note with cases collected. Where a defendant in a state's warrant

charging misdemeanor puts himself in armed resistance to the officer having the warrant, and is slain by the officer in attempting to arrest him without resorting to unnecessary force, the homicide is justifiable: *State v. Garrett*, 1 Winst. 144; 84 Am. Dec. 359, and note.

ARREST — RIGHT OF OFFICER MAKING. — The force which an officer may exercise in making an arrest is such as is necessary to overcome all resistance, even to the taking of the life of the party resisting, and if the officer uses no more force than is necessary to make the arrest, he is not guilty of any crime: *State v. Dierberger*, 96 Mo. 666; 9 Am. St. Rep. 380, and note.

FALLS v. WRIGHT.

[55 ARKANSAS, 562.]

JUDGMENTS BEYOND ISSUE — VALIDITY OF — ASSIGNMENT OF DOWER. — When commissioners are appointed to assign dower out of land described in the widow's petition for their appointment, and they assign her dower out of land not included nor described therein, in addition to the land described, the judgment of the probate court confirming their action is void, as including matter not within nor presented by the issue.

JUDGMENTS BEYOND ISSUE — ASSIGNMENT OF DOWER — LIMITATION AGAINST HEIR. — When a judgment confirming an assignment of dower is void because including matter not presented by the issue, the widow obtains no life estate in the land, and the statute of limitations begins to run against the heir to the estate from the time of his majority, and not from the time of the widow's death.

G. C. Falls and W. E. Walker, for the appellants.

B. L. Wright, for the appellee.

HUGHES, J. The appellee brought this suit in ejectment to recover the northwest quarter of northeast quarter of section 1, in township 11 south, range 30 west. He deraigned title by inheritance from his father, James Wright, who died, in 1869, in possession and occupancy of the land as a part of his homestead.

The appellants claimed title to the land by deed from one Wallace and an administrator's deed to Wallace, made pursuant to a sale by the administrators of the estate of James Wright, which was made by order of the probate court, directing the sale of a pre-emption right to enter the land as swamp-land, which right was supposed to be in James Wright at the time of his death, and to be all the interest he had in the land. There was proof, however, tending to show that James Wright had obtained a patent from the state for the land on the fourth day of February, 1882. The effect of this it is, in this case, unnecessary to discuss. The answer of the appellants also de-

nied the plaintiff's title, and set up the statute of limitations of seven years.

At the date of his death, James Wright, the plaintiff's father, left his widow, Rebecca Wright, the appellee, and other children, his heirs, him surviving. Upon the petition of the widow making all the heirs parties, the probate court, in 1873, appointed commissioners to set aside to the widow dower in the lands of her late husband's estate, which were described in the petition praying for the assignment of dower. The land in controversy here was not mentioned or described in said petition. The commissioners made their report showing that they had assigned to the widow 160 acres of land as dower, including and describing the land in controversy, which had not been mentioned or described before in the proceeding for the assignment of dower, so far as the record shows. The probate court approved the report of the commissioners, and made an order assigning dower to the widow according to the report, including this land in controversy,

In 1874, the probate court, upon application of the administratrix and administrator, who were the widow, Rebecca Wright, and her son, George Wright, ordered this land sold. It was sold, and the sale was reported to and confirmed by the probate court at the January term, 1875, and at the same term of the court the order of confirmation was set aside, the court having discovered, as is stated, that the estate of James Wright had only a right of pre-emption to enter said land as swamp-land unconfirmed. At the same term of the court, an order was made that the administrators sell the supposed pre-emption right, which they did, and made a report of the sale to the court, which report was not approved, nor was the sale confirmed, the court having discovered, as it supposed, by this time, that James Wright did have a title to the land, and that it had been assigned to the widow as dower. The purchaser of the supposed pre-emption right appealed from the order of the probate court refusing to confirm the sale, and the circuit court confirmed the sale.

The appellant Falls bought this land of Wallace in 1880, and has been in adverse possession, claiming to own it, ever since.

The appellee, B. L. Wright, was fourteen years old when his father died, in 1869. He was therefore twenty-one years old in 1876. The widow, Rebecca Wright, died in 1889. This suit was brought in 1890. It follows, therefore, that if the statute

of limitation began to run against the appellee before the death of the widow and the determination of her life estate, if she had such estate in the land, that the plaintiff's action was barred when the suit was brought, the life estate of the widow alone being relied upon to prevent the running of the statute of limitations during its continuance. The circuit court found the facts substantially as stated, refused several declarations of law asked for by the appellants, declared the law, and gave judgment for appellee, holding his title good under the swamp-land patent to his father, which question we do not consider or determine, and holding also that the widow's dower or life estate in the land prevented the running of the statute of limitations till after its determination.

Whether the probate court could assign dower to the widow in the homestead or not, and whether James Wright had title to the land, we do not determine.

Had the probate court jurisdiction to assign the land in controversy here to the widow as dower, the land not having been mentioned in her petition for dower, but mentioned and described in the report of the commissioners assigning dower to the widow, and by them allotted to her as such? Is the judgment of the probate court void? or is it valid against collateral attack?

The probate court is a superior court with general jurisdiction over the matters committed by law to its peculiar cognizance; and when its judgment is attacked collaterally, jurisdiction appearing, its proceedings are conclusive upon all persons until reversed or set aside by a direct proceeding for that purpose, however erroneous they may be: *Montgomery v. Johnson*, 31 Ark. 74; *Borden v. State*, 11 Ark. 519; 54 Am. Dec. 217.

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: 1. The court must have cognizance of the class of cases to which the one to be adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue. . . . A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law

gives so conclusive effect to matters adjudicated. And this is the principal reason why judgments become estoppels. . . . In the note to *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 535, Baron Comyns is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or was not material.' For the same doctrine, that in order to make a decision conclusive, not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale: *Giffard v. Hort*, 1 Schoales & L. 408; *Gore v. Stacpoole*, 1 Dow, 30; *Colclough v. Sterum*, 3 Bligh, 186": *Munday v. Vail*, 34 N. J. L. 420.

The case of *Corwithe v. Griffing*, 21 Barb. 9, was a case where commissioners in partition in their distribution embraced lands other than that contained in the petition, and the court confirmed their report; and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." "In this case, the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented": *Munday v. Vail*, 34 N. J. L. 420; *Reynolds v. Stockton*, 43 N. J. Eq. 211; 3 Am. St. Rep. 305.

In the case at bar the land in controversy was not described or included in the widow's petition for dower; there was no issue as to whether she was entitled to dower in it. The judgment of the probate court assigning it to her as dower was aside from the issue which the proceedings presented, and was therefore void.

It follows that the widow had no life estate in this land, the existence of which would have barred an action for it by the appellee till after its termination at her death. The appellee, having arrived at full age in 1876, should have brought his action within three years from his majority. The action was brought in 1890. The appellants appear to have claimed title to and had adverse possession of the land since 1880. According to the evidence contained in this record, the appellee's cause of action was barred ten years before his suit was brought.

The judgment is therefore reversed, and the cause is remanded for a new trial.

JUDGMENT, WHEN VOID. — When it appears from the whole record that a court has no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in collateral proceedings: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366, and note; but see *Maloney v. Dewey*, 127 Ill. 395; 11 Am. St. Rep. 131, and note as to the conclusiveness of judgments, where the court proceeded irregularly, but had jurisdiction of the subject-matter and parties. A judgment is conclusive only as to the issues submitted to the jury and included in their verdict: *McMakin v. Fowler*, 34 S. C. 281.

LIMITATIONS OF ACTIONS — LIFE TENANTS AND REMAINDERMEN. — Where, under a trust for life, with remainder over, the trustee has the legal title, commensurate only with the life estate of the beneficiary, the trustee and beneficiary cannot convey the estate in fee without the consent of the remaindermen, and if such conveyance is attempted, the statute of limitations will not begin to run against the remaindermen until the death of the tenant for life: *Lamar v. Pearre*, 82 Ga. 354; 14 Am. St. Rep. 168, and note. The statute of limitations does not begin to run against reversioners or remaindermen during the existence of the particular estate: *McCorry v. King*, 3 Humph. 267; 39 Am. Dec. 165, and note. As to when reversioners and remaindermen are affected by statute, see notes to *Allen v. De Groodt*, 14 Am. St. Rep. 634-638; *Woodstock Iron Co. v. Fullenswider*, 13 Am. St. Rep. 78; *Orthwein v. Thomas*, 11 Am. St. Rep. 173.

JUDGMENTS VOID BECAUSE THE COURT EXCEEDED ITS JURISDICTION. — It is very easy to conceive of judgments which, though entered in cases over which the court had undoubted jurisdiction, are void because they decided some question which it had no power to decide or granted some relief which it had no power to grant, and yet it will probably not be possible to formulate any test by which to unerringly determine whether the action of the court is, in similar cases, void, or erroneous only. If a court grants relief which, under no circumstances, it has any authority to grant, its judgment is to that extent void; as where it orders a donation out of the public treasury: *Bridges v. Clay Co. Supervisors*, 57 Miss. 252; or enters judgment for an amount greater than it is authorized to give judgment for in any event: *Feillett v. Engler*, 8 Cal. 76; or where, on a conviction in a criminal prosecution, the court sentences the defendant to undergo a punishment different from or in excess of that which it is authorized to impose for the offense of which he was convicted: *Ex parte Lange*, 18 Wall. 163. So it has been held that a judgment rendered by a justice of the peace against a prosecuting witness for costs, when there was no finding that the prosecution was instituted without probable cause, or through malicious motives, is void for want of power in the justice to enter such judgment: *Little v. Evans*, 41 Kan. 578.

In some instances, courts have undertaken to decide questions not involved in the suit or action before them, and to grant relief therein, and their judgments have been assailed for that reason; and to the extent which they departed from the matters embraced within the record, they have been denied effect. Where a creditor instituted an action, alleging that he had loaned money, relying on a promise that he should be given a mortgage as security therefor upon certain land, and that the borrower had conveyed such land in trust for himself and his wife for life, with remainder to his children, and asked that the trust be declared void with respect to his claim, and the court, proceeding beyond the prayer of the bill, annulled the deed as between the trustee and the *cestuis que trust*, and thereby attempted to destroy the estate of the latter, it was held that this part of its decree was void;

Munday v. Vail, 43 N. J. L. 418. In a later case in the same state, the doctrine of the case last cited was reaffirmed, and the general rule promulgated that a "judgment or decree which is not appropriate to any part of the matter in controversy before the court cannot have any force": *Reynolds v. Stockton*, 43 N. J. Eq. 211; 3 Am. St. Rep. 305. Where a widow brought suit for the sole purpose of having her dower assigned to her, and the court, after assigning it, of its own accord, directed the sale of the residue of the land for division among the minor heirs, the decree of sale was adjudged void: *Seamster v. Blackstock*, 83 Va. 232; 5 Am. St. Rep. 262. See also *Anthony v. Kasey*, 83 Va. 338; 5 Am. St. Rep. 277; *Wade v. Hancock*, 76 Va. 620. A statute of the state of Missouri authorized a statutory foreclosure of mortgages, and a judgment for the sale of the premises, and a personal judgment against the mortgagor. A court of general jurisdiction at law and in equity, proceeding under this statute, rendered against the vendee of the mortgagor a foreclosure and also a personal judgment. This personal judgment, in an elaborate opinion, was held to be void, on the ground that, in addition to having jurisdiction over the subject-matter and of the person, the court must be authorized to give the kind of relief which its judgment assumes to grant; *Fithian v. Monte*, 43 Mo. 502.

In most of the cases cited, the judgment or decree disposed of a subject-matter not included in the action or proceeding, and granted relief not germane to that there sought. A more difficult question arises when, in an action to recover a sum of money, or the possession of real or personal property, the court gives judgment for a sum in excess of that prayed for in the complaint or shown to be owing by its allegations, or for the possession of property different from or in excess of that described in the complaint. As of such excess, there has been no pleading or process seeking to recover it, or notifying the defendant that it was claimed of him. Nevertheless, it has been assumed, rather than decided, that a judgment larger than the complaint justified, or for more than specified in the writ, cannot be avoided collaterally: *Gillitt v. Truax*, 27 Minn. 528; *Chaffee v. Hooper*, 54 Vt. 513.

The case of *Reynolds v. Stockton*, already cited, was taken to the supreme court of the United States on a writ of error, where the judgment of the state court was sustained in an opinion of the court delivered by Mr. Justice Brewer and reported in 140 U. S. 254. The judgment under consideration was pronounced in the state of New York, in an action brought by certain policy-holders of an insurance corporation against that corporation and the superintendent of insurance of the state of New York. The statute of that state required insurance corporations doing business within it to deposit with the superintendent of insurance the sum of one hundred thousand dollars as a fund for the protection of policy-holders. The complaint purported to be on behalf of the plaintiff and all other policy-holders and persons interested in the funds of the insurance corporation, and it alleged that a deposit had been made with the superintendent of insurance of one hundred thousand dollars, as required by statute. The prayer for relief was, that the superintendent of insurance be adjudged to account for the moneys and securities deposited with him, and the interest and increase thereof, and that the securities be ordered sold and distributed. In this action, Joel Parker was appointed ancillary receiver, he having been previously appointed receiver in a suit against the same corporation pending in the courts of New Jersey. In March, 1886, the court in New York made certain allowances for expenses, which it directed the ancillary receiver to pay, and after such payment he was directed to pay the balance of the funds in his hands to the receiver in the

suit pending in New Jersey. Before this latter order was made, Parker had resigned his office as receiver in New Jersey, and Robert F. Stockton had succeeded him. The order of the New York court was complied with, and all the moneys and securities in the hands of the receiver in that state were paid to the New Jersey receiver. Afterwards, in October, 1886, a further judgment was entered in the New York court, to the effect that the plaintiffs recover of Joel Parker, as receiver of the corporation, and also of the corporation, the sum of \$1,010,496.29, the money so recovered to be paid into court for distribution. When this later judgment was presented to the court in New Jersey, it refused to allow or accept it, because it was not responsive to the issues, as well as for other reasons. The opinion of Mr. Justice Brewer contains a full review of the subject, and so far as pertinent to the topic here under consideration, is as follows: "We are of opinion that the decision of the chancery court of New Jersey, as sustained by the court of errors and appeals of that state, is correct, and must be affirmed. The first and obvious reason is, 'that the judgment of the supreme court of New York was not responsive to the issues presented. The section of the federal constitution which is invoked by plaintiffs is section 1 of article 4, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.' Under that section, the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state. The scope of this constitutional provision has often been presented to and considered by this court, although the precise question here presented has not as yet received its attention. It has been adjudged that the constitutional provision does not make a judgment rendered in one state a judgment in another state upon which execution or other process may issue; that it does not forbid inquiry, in the courts of the state to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person or in respect to the subject-matter, or if rendered in a proceeding *in rem*, its jurisdiction of the *res*. Without referring to the many cases in which this constitutional provision has been before this court, it is enough to notice the case of *Thompson v. Whitman*, 18 Wall. 457. The view developed in the opinion in that case, as well as in prior opinions cited therein, paves the way for inquiry into the question here presented. If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case. Given a court of general jurisdiction over actions in ejectment as well as those in replevin, — a complaint in replevin for the possession

of certain specific property, personal service upon the defendant, appearance, and answer denying title, — could (there being no subsequent appearance of the defendant, and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state. We are not concerned, in this case, as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate rendered in an action whose pleadings disclose only a claim for the possession of personal property cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not in fact put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case, the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to the judgments rendered in the courts of another state. In the opinion of the court of errors and appeals, the case of *Munday v. Vail*, 34 N. J. L. 418, is cited. In that case, the proposition stated in the *syllabus*, and which is fully sustained by the opinion, is, that 'a decree in equity which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.' It appeared that on May 12, 1841, Asa Munday, the owner, with his wife, Hetty Munday, conveyed the premises for which the action (which was one of ejectment) was brought, to John Conger, upon the following trust, to wit: 'For the use and benefit of said Asa Munday and wife, and the survivor of them, with the remainder to the children of said Asa Munday and wife, in equal parts and shares, in fee.' Plaintiff was the sole surviving issue of Asa Munday and Hetty Munday, and took, under the facts, all the title which, on the 12th of May, 1841, was vested in Asa Munday. On January 16, 1844, Ephraim Munday filed his bill in the court of chancery, setting forth that he had loaned certain moneys to Asa Munday upon an agreement that he, the said Asa, would secure said loan by a mortgage upon his land, including the premises in question; and that said Asa, in violation of his agreement, and to defraud him of

his rights, had conveyed them away to John Conger, upon the trust already mentioned. The bill also showed that plaintiff had obtained judgment for his debt. The prayer was 'that the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the said John Conger, and the said deed and declaration of trust so made and executed by the said John Conger and wife as aforesaid, may, by the order and decree of this honorable court, be set aside and declared to be fraudulent and void against the said judgment and writ of execution of your orator, and that the said judgment and execution of your orator may be decreed a lien on said lands and tenements so conveyed to said John Conger,' etc. Plaintiff was a defendant in that action, and, then an infant, appeared by her father as guardian. The decree, which was entered on the 15th of December, 1846, was, generally, that the said deed from Asa Munday and wife to Conger was fraudulent, null and void, and of no force whatever in law or equity, and ordered and adjudged that it be delivered up to be canceled, and further, that the plaintiff's judgment is and was a lien. No proceedings were had under this decree, the money due plaintiff having been paid or secured to him. Subsequently, and on September 15, 1851, a decree for costs against Asa Munday, in another suit, was entered in the chancery court. Upon such decree the property in question was levied upon and sold to defendant. The validity of the title acquired by this proceeding was the matter in controversy. The title of plaintiff was good under the trust deed of May 12, 1841, unless defeated by this sale and the deed made thereon; and the defendant's title, adverse to plaintiff's, depended on the question whether the decree of December 15, 1846, was valid to the extent of its language annulling absolutely the conveyance from Asa Munday and wife to John Conger, and directing the surrender of such deed, or, notwithstanding its general language, was to be limited to the matters of inquiry presented by the complaint and answer, and therefore simply an adjudication that the deed was voidable, and annulling it so far as it conflicted with the rights of plaintiff in that suit, leaving it to stand good as a deed *inter partes*, and valid as to all other parties. It was held that the latter was the true construction, and that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion: 'The inquiry is, Had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: 1. The court must have cognizance of the class of cases to which the one to be adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it con-

cludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus Lord Coke, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop": Co. Lit. 352 b. And in a note to *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 535, Baron Comyn is vouched for the proposition that judgments "are conclusive as to nothing which might not have been in question, or were not material." For the same doctrine, that, in order to make a decision conclusive, not only the proper parties must be present, but that the court must act upon "the property according to the rights that appear" upon the record, I refer to the authority of Lord Redesdale: *Gifford v. Hort*, 1 Schoales & L. 385, 408. See also *Gore v. Stacpole*, 1 Dow, 18, 30; *Colclough v. Sterum*, 3 Bligh, 181, 186.' Reference is made in the opinion to the case of *Corwith v. Griffing*, 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.' This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See also *Unfried v. Heberer*, 63 Ind. 67. In that case, the inquiry was as to the effect of a decree of foreclosure rendered upon default. In the complaint in the foreclosure proceedings, the widow and children of the mortgagor were named as parties, he having died prior to the commencement of the suit. The allegation of the complaint was, that the defendants were interested as heirs, and the prayer was for a decree foreclosing such interests. It was not averred that the widow had joined in the mortgage, or even that she was a widow; but she was made a defendant, and alleged to be an heir. Subsequently, she asserted rights in the premises as widow, and in respect to this decree upon default, the court observed: 'A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint, and as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it. See, however, *Helms v. Love*, 41 Ind. 210; *Fletcher v. Holmes*, 25 Ind. 458; *Minor v. Walter*, 17 Mass. 237.' See also *Goucher v. Clayton*, decided by Vice-Chancellor Wood, and reported in 11 Jur., N. S., 107; 34 L. J., N. S., 239. In the case of *Washington &c. Packet Co. v. Sickles*, 24 How. 333, 341, Mr. Justice Campbell, speaking for the court, declared that 'the essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character

in which they are litigants.' In the case of *Smith v. Ontario*, 18 Blatchf. 454, 457, Circuit Judge Wallace observed that 'the matter in issue has been defined, in a case of leading authority, as that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading': *King v. Chase*, 15 N. H. 9; 41 Am. Dec. 675. But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment rendered by even a court of general jurisdiction the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on or appearance of the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state, and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state. This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that state to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could therefore be rendered therein which went beyond the subjection of this fund to those claims": *Reynolds v. Stockton*, 140 U. S. 264.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

**CONSOLIDATED NATIONAL BANK v. PACIFIC COAST
STEAMSHIP COMPANY.**

[95 CALIFORNIA, 1.]

AGENT'S AUTHORITY TO BORROW MONEY NOT INFERABLE FROM HIS EMPLOYMENT WHEN. — If the transaction of a business carried on by an agent for his principal absolutely requires the exercise by the agent of the power to borrow money in order to carry it on, then such power is impliedly conferred as an incident to the employment; but the fact that the act proposed is more convenient or advantageous, or more effectual in the transaction of the business provided for, does not afford a sufficient ground for the inference of such a power, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment.

NECESSITY FOR AGENT TO BORROW MONEY BEING NEGATIVED NO PRESUMPTION OF HIS AUTHORITY TO BORROW. — Where it is proved that there was no necessity for an agent to borrow money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority.

OVER-DRAFT, NO OSTENSIBLE AUTHORITY OF AGENT TO MAKE, WHEN. — There is no ostensible authority for a local agent of a steamship company to overdraw from a bank, where it appears that its general agents had no notice that he had an account with the bank or that he had ever overdrawn the account, that they had furnished him with a safe in which to keep the money collected by him, and that the bank did not notify the general agents of the over-draft, but dealt with the local agent only, and accepted his individual note for the over-draft.

SUSTAINING OF DEMURRER TO COUNT OF COMPLAINT NOT PREJUDICIAL, EVEN THOUGH ERRONEOUS, WHEN. — Where a complaint consists of two counts, both intended to represent the same cause of action, and the evidence shows that no recovery could be had upon the first count, the sustaining of a special demurrer to that count, even if erroneous, cannot be prejudicial error.

SUSTAINING OBJECTION TO QUESTION AFTERWARDS PERMITTED TO BE ANSWERED NOT PREJUDICIAL. — The sustaining of an objection to a question which the witness is afterwards permitted to fully answer cannot be prejudicial error.

EVIDENCE OF DEFALCATIONS OF AGENT, WHEN ADMISSIBLE, AND FOR WHAT PURPOSE. — When a bank sues a steamship company to recover money alleged to have been overdrawn from the bank by the company, evidence offered by the company, tending to prove the amount of the defalcations of its local agent, who had overdrawn his account with the bank, that his over-drafts were made to pay the amount he was behind in his accounts with the company, and that at the time of the over-drafts he had money of the company's on hand sufficient to pay all claims against it, is admissible, as tending to prove that the over-drafts were not loans to the company, and that the agent had neither express nor implied authority from the company to make them, but that they were made by the agent for the purpose of paying his own debt to the company.

REFUSAL TO REOPEN CASE FOR FURTHER EVIDENCE NO ABUSE OF DISCRETION WHEN. — The refusal of a trial court to reopen a case, after the close of the trial, for the purpose of allowing additional evidence to be introduced, is not an abuse of discretion, where no excuse is shown for not having produced the evidence at the trial.

Works, Gibson, and Titus, and Works and Works, for the appellant

Luce and McDonald, for the respondent.

VANCLIEF, C. The complaint in this action, showing that plaintiff and defendant are corporations, is in two counts; the first alleging "that defendant is indebted to the plaintiff for moneys had and received by it from the plaintiff in the sum of \$13,574.47, which sum is now due and unpaid." In the second count it is alleged, substantially, that for many successive years the defendant did business with the plaintiff by depositing in plaintiff's bank, at the city of San Diego, and drawing therefrom on its checks large sums of money, during which time the defendant frequently overdrew its account in large sums, which were repaid at various times, except as hereinafter alleged. "That between April 18, 1889; and November 1st of same year, the defendant, by its checks, regularly drawn on the plaintiff, overdrew its account in plaintiff's said bank, in the sum of \$10,754.91," which, with interest at twelve per cent per annum, amounts to \$13,574.47. For this amount plaintiff prays judgment. A special demurrer to the first count, on the ground of uncertainty, was sustained by the court.

The answer of the defendant specifically denies each allegation of the second count, except that each party is a corporation.

The case was tried without a jury, and the court found for defendant on all the issues, and rendered its judgment accordingly.

Plaintiff's motion for a new trial, made on a bill of exceptions, having been denied, the plaintiff appeals both from the judgment and from the order denying a new trial.

1. Appellant contends that the evidence is insufficient to justify the findings of the court in any material particular.

It appears that during the transactions in controversy the defendant was engaged in the business of marine carrier of freight and persons along the Pacific coast from Mexico to Alaska. Goodall, Perkins, & Co., at San Francisco, were its general agents; but it had a local agent at each port on the coast where it did business. These local agents were under the control of the general agency, and were required to report directly to Goodall, Perkins, & Co., at San Francisco. During the transaction in question, J. H. Simpson was the local agent for the defendant at the port of San Diego, in this state, and the plaintiff was there engaged in the business of banking. Continually since the organization of the plaintiff's bank, in 1883, until October, 1889, Simpson had an account of his deposits and drafts of money with plaintiff's bank, kept in the name of "J. H. Simpson, agent." To this account he deposited in the bank, from time to time during each month, considerable sums of money collected by him for the defendant. During the same period he was treasurer of a Masonic lodge, and also of a Unitarian church, and from time to time deposited to the same account considerable sums of money belonging to the lodge and to the church, amounting to over twenty thousand dollars, besides twenty-three thousand dollars of his own money. All his checks upon this account were signed "J. H. Simpson, Agent," and the greater portion of them made payable to himself, and actually paid to him. Of those paid to himself, the greater portion were paid by drafts of the plaintiff on San Francisco, payable to Goodall, Perkins, & Co. There was nothing on the checks, save the name of the payee, to indicate the purpose for which they were drawn. Neither the checks nor the account indicated for whom Simpson was agent.

On or about October 1, 1889, Simpson was discovered to be some nine thousand dollars short in his accounts with defendant, which he professed to be unable to pay, and for that reason was removed from his position as agent of defendant. At

the same time, his account with the plaintiff was overdrawn \$11,404.32, which, with interest at twelve per cent per annum, constitutes the amount sued for in this action.

If Simpson had actual or ostensible authority to borrow money for the defendant, the plaintiff is entitled to recover, otherwise not. This is the ultimate and pivotal question of fact presented for decision. Upon this question the trial court found for the defendant, and I think the finding is justified by the evidence.

The evidence is positive that no express authority to borrow money on defendant's account, nor even to deposit defendant's money in any bank, was ever given to Simpson; and there is no pretense to the contrary. But counsel for appellant contend, in substance, that such authority was implied from the necessity of borrowing money in order to carry on the business which Simpson was employed and authorized to do. The evidence, however, strongly tends to prove that no such necessity ever existed. It appears that Simpson occupied the position of agent for defendant at the port of San Diego since 1875, and that from some time in 1876 until the organization of the plaintiff bank in 1883, he had an account with the Commercial Bank of San Diego, similar to that which he afterwards had with the plaintiff; and that upon the organization of the plaintiff bank, as the successor of the Commercial Bank, his account with the latter was transferred to the former. His account in the Commercial Bank was often overdrawn to the extent of two hundred to three thousand dollars. Between the second day of January and the thirty-first day of December, 1888, he overdraw his account in the plaintiff bank thirty-seven times, in sums ranging from one thousand to four thousand six hundred dollars; but these over-drafts were frequently canceled by deposits. On December 31, 1888, the account stood credited with a balance of \$1,560.40 in Simpson's favor; and there was a still larger balance in his favor on the thirteenth day of February, 1889, when he drew a check in favor of himself for \$15,026.92; and the next day (February 14th) drew another for \$5,000. These two checks were paid to him in drafts on San Francisco, payable to Goodall, Perkins, & Co., which were paid accordingly. On February 14, 1889, the overdraft was \$8,930; March 13th, \$13,782; April 19th, \$12,567; May 17th, \$13,741; June 19th, \$14,099; July 16th, \$14,111; August 21st, \$13,692; September 12th, \$15,717; October 8d,

\$13,398; and October 11th, when the account was closed, \$11,404.32.

It was proved that all over-drafts from December 31, 1888, until the account was closed were paid to Simpson in drafts on San Francisco, payable and actually paid to Goodall, Perkins, & Co. as the general agents of the defendant. It seems incredible that the agents of plaintiff could have believed that any of these over-drafts were necessary to enable Simpson to carry on any business which he was authorized to do as local agent of the defendant at the port of San Diego, or that Simpson intended to use or could have used them for any such purpose. Nor, indeed, is there any evidence that they ever pretended so to believe. Yet the over-draft sued for must be included in those drawn since February 12, 1889.

Mr. Simpson, who appeared as a witness on the part of the plaintiff, testified that there never was any necessity for his borrowing money to carry on any business which he was authorized to do for the defendant; that enough money was always collected by him to pay the running expenses of all the business he was authorized to do; that all his over-drafts, which were paid to him by plaintiff in drafts on San Francisco, payable to Goodall, Perkins, & Co., were made for the sole purpose of reducing the balance against him in his accounts with the defendant, kept by Goodall, Perkins, & Co., and that he so informed Mr. Bryant Howard, the president of the plaintiff bank, before the 18th of February, 1889.

Mr. George C. Perkins, of the firm of Goodall, Perkins, & Co., testified on behalf of the defendant that there never was any necessity for Simpson to borrow money for defendant for any purpose whatever.

As to the implied power of an agent to borrow money on account of his principal, the court of appeals, in *Bickford v. Menier*, 107 N. Y. 490, said: "If the transaction of the business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment." See also *Hurley v. Watson*, 68 Mich. 531; *Mechem on Agency*, sec. 399; *Wharton on Agency*, sec. 137;

Morawetz on Private Corporations, sec. 606. Section 2319 of the Civil Code provides that an agent has authority "to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." It having been proved, as above shown, that there never was any necessity for borrowing money to effect any purpose of Simpson's agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority, when there was no necessity for so doing.

2. There is no evidence of ostensible authority. Simpson testified that he never notified the defendant or its general agents that he had overdrawn his account with plaintiff's bank, and that there was nothing in his correspondence with the defendant or its agents, or in the books which he kept for defendant, from which any such over-draft might have been inferred; and, furthermore, that he had never informed defendant that he had an account with plaintiff or any other bank, and did not believe that defendant had notice of any such account before October, 1889. The only circumstance which it is claimed should have operated as notice of such account to Goodall, Perkins, & Co. is, that seven or eight years before the trial they sent an expert accountant to examine the books kept by Simpson; and on that occasion, in order to balance his account, Simpson exhibited his pass-book as a voucher for a small balance in his favor in either the plaintiff's bank or the Commercial Bank. The pass-book then exhibited showed the account to be in the name of "J. H. Simpson, Agent."

Mr. Perkins testified that Goodall, Perkins, & Co. never had notice that Simpson had any account with any bank; that in 1884 they furnished him a good safe, supposed to be burglar-proof, in which to keep the money of the defendant; and they always supposed that Simpson purchased the drafts remitted to them with defendant's money, until after they discovered that he was short in his accounts with them, and after his last over-draft upon plaintiff. There was no evidence that defendant ever paid or recognized any debt for borrowed money contracted by Simpson, or by any other local agent. Moreover, the circumstantial evidence had a tendency to prove that the agents of the plaintiff never regarded the account of "J. H. Simpson, Agent," as the account of the defendant, and never understood that defendant was responsible for Simpson's over-

drafts. 1. Although often anxious to have the larger over-drafts reduced, and requesting Simpson to reduce them, they never notified the defendant of the existence of the account, or of any over-draft, until more than fifteen months after Simpson was removed. 2. On June 20, 1888, the plaintiff took Simpson's individual note, signed "J. H. Simpson," for seven thousand dollars, to cover his over-drafts on the account of "J. H. Simpson, Agent." This note was afterwards, in July, 1888, paid by three memorandum checks drawn by the cashier on the account of "J. H. Simpson, Agent." 3. About the 1st of April, 1889, Mr. Howard, president of the bank, complained to Mr. Simpson of the amount of the over-draft, and requested that it be reduced. Simpson then told Mr. Howard that he (Simpson) was about to go to England, where he expected to get about twenty-one thousand dollars, and on his return, in about three months, he would pay the over-draft. Howard asked him if he felt sure of that, and Simpson answered that he did. It was then agreed between them that an over-draft not exceeding twelve thousand dollars would be allowed during Simpson's absence, and that Simpson's son, who was to act for his father during his absence, should be allowed to over-draw the account to that limit. Thereupon Simpson gave the bank written authority to allow his son to draw checks and transact all banking business for him until further orders, and Simpson left for England on April 8, 1889. I think it does not appear when he returned, but it does appear that he failed to raise any money. On May 17, 1889, the over-draft was \$13,741; June 19th, \$14,099; and September 12th, \$15,717; yet during that time no notice of the over-draft was given to the general agents of the defendant. In October, 1889, Simpson was removed on account of the deficit in his accounts with the defendant. Of this the plaintiff had notice, and soon thereafter Mr. Howard, the president of the bank, went to San Francisco and called on Goodall, Perkins, & Co., and earnestly requested them to retain Mr. Simpson in their employ at San Diego, in the same position he had before occupied, and offered to go on his bond for the faithful performance of his duties; yet did not then, nor until about fifteen months thereafter, notify Goodall, Perkins, & Co. of Simpson's over-draft in plaintiff's bank, nor of any demand against the defendant.

Mr. Howard's attempted explanation of these circumstances seems unreasonable and wholly unsatisfactory.

Section 2317 of the Civil Code defines ostensible authority

to be "such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess."

If there was any evidence tending to prove this, I think it safe to say the preponderance of the evidence was against it, and fully justifies the finding of no ostensible authority: *Robinson v. Nevada Bank*, 81 Cal. 107.

3. It is contended that the sustaining of the special demurrer to the first count of the complaint was error prejudicial to defendant. Conceding that it was error, I think it appears that plaintiff was not injured thereby; for although it may be true, as stated by counsel, that a state of facts may possibly have existed entitling plaintiff to recover under that count without proving the authority of the agent, Simpson, to borrow money for defendant, yet it is quite apparent from the evidence that no such state of facts did exist, and that the first and second counts were intended to represent the same cause of action.

4. The court sustained an objection to each of the following questions propounded by plaintiff's counsel to plaintiff's witness Simpson: "1. When did you first commence to deposit moneys for defendant in the Consolidated National Bank? 2. State on whose account and for whom these deposits were made by you as agent." But the witness was afterwards permitted to answer and did fully answer these questions.

5. There was no error in allowing defendant to prove the amount of Simpson's defalcations, that his over-drafts were made to pay the amount he was behind in his accounts with defendant, and that at the time of the over-drafts, he had money of the defendant's on hand sufficient to pay all claims against the defendant. Obviously, this testimony tended to prove that the over-drafts were not loans to defendant, and that Simpson had neither express nor implied authority from defendant to make them; but that they were made by Simpson for the purpose of paying his own debt to defendant. For these purposes the evidence was competent, even conceding that it did not touch the question as to the ostensible authority of Simpson.

6. The trial, so far as the evidence was concerned, was closed on July 3d, when, by consent of both parties, the summing up by counsel was postponed until July 7th. On July 7th, the court being otherwise engaged, it was again postponed

until July 8th. On July 8th it was again postponed until July 9th, by request of plaintiff's counsel. On July 9th plaintiff's counsel, without previous notice, moved the court to open up the case for the purpose of allowing the plaintiff to make proof that Simpson, in the transaction of defendant's business, had signed receipts, advertised in the papers, and signed other papers and documents, "J. H. Simpson, Agent"; and also that since the alleged over-drafts the defendant has taken conveyances of property from Simpson to secure defendant against loss. This motion was opposed, on the grounds that the proposed evidence was irrelevant and immaterial, and that there was no showing or suggestion of surprise, oversight, or inability to have procured the proposed evidence upon the trial. The court denied the motion. Counsel for appellant contend that this action of the court was an abuse of its discretionary power, but in this I think they are mistaken.

Neither the forms nor substance of the alleged receipts, advertisements, or other documents signed by Simpson as "agent," were shown. It may, therefore, be presumed that, unlike his account with and checks upon the plaintiff's bank, they contained the name of the principal, — the Pacific Coast Steamship Company, — and expressly showed the receipted demands to be claims against the principal, the advertisements to be the advertisements of the business of the principal, and that the other documents expressly purported to bind the principal. Such evidence would have added nothing favorable to plaintiff's case. Neither would the fact that defendant took security from Simpson, unless the security was given to indemnify defendant for loss on account of the demand of the plaintiff in suit, which is not pretended. Besides, there was no showing of any excuse for not having produced the evidence at the trial.

I think the judgment and order should be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

AGENT, WHEN HAS POWER TO BORROW MONEY. — The authority of an agent to borrow money for his principal may be expressly given, or it may be impliedly conferred upon him as an incident to the business which he undertakes to transact for his principal. When the power to borrow money is expressly given to an agent, the existence and extent of the power are, of course,

to be determined by a construction of the instrument by which it is given. Where a general power to borrow money is expressly given, such power includes authority to give to the lender the ordinary securities for the sum borrowed, such as bonds, notes, acceptances, or collaterals: *Hatch v. Coddington*, 95 U. S. 48. In the case of *Humphrey v. Patrons' Mercantile Association*, 50 Iowa, 607, the plaintiff, who was the general manager of the defendant, and also one of its directors, called a meeting of the directors to devise some means to relieve it from pressing obligations. At this meeting it was agreed that he should borrow one thousand dollars for that purpose, and that the other directors should raise an additional six hundred dollars for the same purpose. The sixteen hundred dollars were raised, and the plaintiff paid the indebtedness of the association therewith as far as it went. It was held that these facts showed an express contract authorizing the plaintiff to borrow money to pay the debts of the defendant, and that it was liable to him therefor. In *Spooner v. Thompson*, 48 Vt. 259, an agent was employed to buy goods for the principal and sell them at the principal's store. A written agreement between them stipulated that the principal would furnish capital, or authorize the agent to obtain credit upon the principal's name and responsibility for the purchase of such goods to an amount not exceeding four thousand dollars; that all such purchases should be made in the name of the principal, and should not exceed, in cash down and on credit, the sum specified, unless by express consent of the principal, and that, acting within said limits and to the extent of said capital, in the legal and proper transaction of said business, the agent's acts should be binding upon the principal. It was held that this agreement did not authorize the agent to borrow money on the credit of the principal.

IMPLIED POWER OF AGENT TO BORROW MONEY ON HIS PRINCIPAL'S ACCOUNT. — The power of an agent to borrow money on his principal's account may be implied, when the carrying on of the business intrusted to him absolutely requires the exercise of such power. An agent is presumed to have power to do whatever is necessary to effect the purposes of his agency. The necessity for borrowing money must, however, be shown, before the power to borrow can be inferred from the original employment of the agent. To justify this inference, the borrowing must be practically indispensable; and it is not sufficient that it was convenient, or advantageous, or more effectual in the transaction of the business provided for thereby. Nor is a party dealing with an agent entitled to assume the existence of any extraordinary state of facts, in order to bring the act of the agent within the scope of his apparent authority: *Mecham on Agency*, sec. 399; 2 *Morawetz on Private Corporations*, 2d ed., sec. 606; *Bickford v. Menier*, 107 N. Y. 490; *New York Iron Mine v. First Nat. Bank of Negaunee*, 39 Mich. 644; *Hurley v. Watson*, 68 Mich. 531; *Collins v. Cooper*, 65 Tex. 460; *Heath v. Paul*, 81 Wis. 532. In *Bickford v. Menier*, 107 N. Y. 490, the defendants, who were merchants in Paris, sent an agent to open an office in New York City for the sale of their goods. He carried on the business, and kept a bank account in his own name, and received a salary for his services. He borrowed several sums of money from the plaintiff, who was his sister, which he used in making payments due from him to the defendants, but he never represented to her that he had authority to borrow money for the defendants. It was held that the power to borrow money did not come within the scope of his authority, and that the defendants were not liable for the money borrowed by him. In *Heath v. Paul*, 81 Wis. 532, one Roth, as agent for the defendant Paul, managed the latter's store, kept the accounts thereof, and was authorized to draw checks on the

"store account," in the State Bank of La Crosse, for the price of goods and the expenses of the store, and to make over-drafts on that account, being required to sign all checks, "John Paul, Store Account, R." Drafts for goods sold to the store were frequently sent to the La Crosse National Bank for collection, and Roth paid them by checks, signed as above, on the State Bank. Roth arranged with the National Bank that it should hold these checks, which were frequently over-drafts, for short terms before presenting them for payment, and he paid interest thereon to the National Bank. The above-described mode of dealing, except the fact that interest was paid, came to Paul's knowledge, and he seems to have sanctioned it, so far as he was apprised of it. It was held that these facts were insufficient to prove that Paul had given Roth general authority to borrow money, and that he was not liable to the plaintiff for money which Roth had borrowed from her. The following instruction, given to the jury by the trial court in that case, was held not to be erroneous: "The facts that the agent had the management of defendant's store, kept the accounts thereof, was authorized to draw checks on the bank for the price of goods and expenses of the store, to make over-drafts on that bank, and that the defendant sanctioned his mode of dealing with the bank, so far as he was apprised of it, were insufficient to prove that the agent had power to borrow money generally, or of plaintiff."

In *Collins v. Cooper*, 65 Tex. 460, the facts in evidence were held to justify the inference that the agent had implied authority to borrow money to carry on the large mercantile business of which he was the sole manager. In delivering the opinion of the court, Stayton, J., thus states the evidence, which, in the opinion of the court, justified the inference: "The evidence shows that for a long series of years the agent had borrowed large sums of money from persons resident of the county, some of whom were acting in fiduciary capacities, and that for the sums so borrowed he executed notes in the names of his principals. These notes were regularly entered upon the books of the firm as bills payable, the entries giving the names of the creditors, sums due, when due, and rates of interest, but not stating that the notes were given for borrowed money. The husband of one of the defendants was employed in the store for several years; was book-keeper for one year, and knew that borrowed money was used in the business. The entire business was conducted openly and without the least concealment. Under this state of facts we cannot say that there was not evidence from which the jury might have found that the agent had an implied authority to borrow money. He was directed to manage the business as he deemed best. He deemed it necessary to borrow money; and the inference from his evidence is, that it was necessary to do so, to make advances to farmers, without which the business could not have been carried on. We cannot say, as a matter of law, that the borrowing of money for the purpose of such a mercantile business was not within the scope of the general powers conferred on the agent."

Where it is absolutely necessary, in order to carry on the business with which the agent is intrusted, that he should borrow money on the credit of his principal, the authority to borrow will be implied: *Hearne v. Keene*, 5 Bosw. 579. In that case the person who borrowed the money sued for was Laura Keene's agent "for all the money business of the theater," "for all business purposes" whatever. The rent of the theater in which Miss Keene was playing had to be paid every week, in order to save the lease from forfeiture. Being short of funds, he borrowed money to pay the rent, and it was held that he had the right, in virtue of his agency, to borrow the money for that purpose, under those circumstances.

But a power given to an agent to draw or indorse checks for and in the name of his principal gives him no authority to overdraw his principal's account at the bank: *Union Bank v. Mott*, 39 Barb. 180. Nor does a specific authority to buy corn for the account of the principal confer upon the agent authority to borrow money to make such purchase upon the credit of the principal: *Bank v. Bugbee*, 3 Keyes, 461. In *Tucker v. Woolsey*, 64 Barb. 142, the plaintiffs, merchants in Paris, sent one Dreux to New York with seven large trunks full of goods, giving him a letter to the defendants, in which they said: "Any advice or assistance you may render him in the prosecution of his business will be appreciated." The defendants rented him an office in which to display his goods, and the plaintiffs were held liable for the rent, because the office was necessary for the prosecution of his business. But the defendants also lent him money with which to return to France. It was held that the agent had no authority to borrow this money, and that they could not be allowed for this item.

MINING SUPERINTENDENT HAS NO AUTHORITY TO BORROW MONEY. — A mining superintendent or manager has not, by virtue of his employment merely, authority to borrow money on the credit of his principals, for the purpose of carrying on the business of the concern: *Ricketts v. Bennett*, 4 Com. B. 686; *Hawtayne v. Bourne*, 7 Mees. & W. 595; *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 1 Col. 531; 2 Col. 565; *Breed v. First Nat. Bank of Central City*, 4 Col. 481. See also *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644.

AUTHORITY OF MASTER OF SHIP TO BORROW MONEY. — When the circumstances are such as to require it, the master of a ship is justified in borrowing money to pay for the articles required; but to charge the owners in such case, the lender must ordinarily show that the money not only was borrowed for a proper purpose connected with the ship or her navigation, but that it was so applied: *McOready v. Thorn*, 51 N. Y. 454; *Stearns v. Doe*, 12 Gray, 482; 74 Am. Dec. 608, and note. But in *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232, it was held that a ship's husband has no right to borrow money on the vessel's account, unless expressly authorized by her owners, and in the absence of such authority they cannot be held liable for money so borrowed by him.

CASHIER OF BANK — POWER TO BORROW MONEY. — The cashier of a bank has an inherent power to borrow money in the regular course of the business of the bank. And the usage to allow him to borrow is so universal that notice of the deprivation thereof must be brought home to any person who is to be affected by it. But he can only borrow money to use strictly for banking purposes: 1 Morse on Banking, sec. 160; *Crain v. First Nat. Bank of Jacksonville*, 114 Ill. 516; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; 14 Am. Dec. 681; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

RATIFICATION OF AN AGENT'S ACT IN BORROWING MONEY. — Where the act of an agent, in borrowing money for his principal, was without original authority, the principal's ratification of the act cannot be inferred from the mere fact that the money borrowed went into the business of the principal or was beneficial or advantageous to him: *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 1 Col. 531; *Arey v. Hall*, 81 Me. 17; 10 Am. St. Rep. 232; *Spooner v. Thompson*, 48 Vt. 259; *Heath v. Paul*, 81 Wis. 532. But where an agent without original authority borrows money on behalf of his principal, and uses it in a manner advantageous to the principal, the ratification

of the agent's act may be inferred from the silence of the principal after knowledge of all the facts, or from his promise to repay the money so borrowed: *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 2 Col. 565; *Breed v. First Nat. Bank of Central City*, 4 Col. 481; *Collins v. Cooper*, 65 Tex. 480.

[IN BANK.]

TATUM v. ROSENTHAL.

[95 CALIFORNIA, 129.]

JUDGMENT AGAINST CORPORATION CONCLUSIVE IN ACTION ON UNPAID SUBSCRIPTION TO CAPITAL STOCK. — A judgment against a corporation establishes its liability conclusively, until reversed in a direct proceeding, and concludes the stockholders in an action brought to compel them to pay in the unpaid portion of their subscriptions to the capital stock toward the satisfaction of such judgment; and the complaint in such action need not allege the indebtedness upon which the judgment was rendered.

PLEADING — COMPLAINT NEED NOT ALLEGE PROCEEDING TO BE FOR BENEFIT OF ALL CREDITORS OF INSOLVENT CORPORATION WHEN. — A complaint in an action in the nature of a creditor's bill to compel the subscribers to the capital stock of an insolvent corporation to pay in the unpaid portion of their subscriptions to be applied to the satisfaction of a judgment obtained against the corporation which alleges that the judgment debt exists, that the corporation is insolvent, that the subscribers owe a certain sum on their unpaid subscriptions, that the execution issuing on the judgment has been returned wholly unsatisfied, but which does not upon its face show that there are any other creditors of the corporation, states a cause of action, although it does not allege that the proceedings are for the benefit of all the creditors; and the question of defect in the pleading or of non-joinder of other creditors cannot be raised upon general demurrer to such complaint, but must be raised by answer.

JUDGMENT CREDITOR MAY FILE BILL AGAINST PERSONS HOLDING PROPERTY OF DEBTOR WHEN. — A judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with other judgment creditors, file a bill against persons holding property of the debtor which cannot be reached by execution.

SINGLE CREDITOR MAY FILE BILL WHEN. — Where a fund can only be divided satisfactorily among a certain class of persons, the decree must be so framed that all those persons may be brought in for their distributive shares, but even then the bill may often be filed by any one of them on his own behalf. It is only when it subsequently appears to the court that a distribution must be made that a decree will be made for the benefit of all.

Whitworth and Shurtleff, for the appellants.

George A. Rankin, for the respondents.

FOOTE, C. This action is in the nature of a creditor's bill to compel certain subscribers to the capital stock of an insol-

vent corporation to account for and pay in the unpaid portion of their subscriptions to the satisfaction, as far as it may, of a judgment obtained against the corporation, upon which execution had been returned wholly unsatisfied.

Demurrers were filed to the complaint, which alleged, among other matters, that the complaint did not state facts sufficient to show a cause of action. The demurrers were overruled, and answers were filed. A trial was had, which resulted in a judgment for plaintiffs against certain of the defendants. Some of the latter have appealed from the judgment, and the only points made in their briefs for its reversal are: —

1. That the complaint does not allege the indebtedness upon which the judgment set out in the complaint was recovered. As to this, it can be said that when this judgment was rendered against the corporation, it established its liability conclusively, so far as any judgment can, to pay the debt. It concluded the stockholder, in a case like this, who was in privity with the corporation, and is valid until reversed in a direct proceeding: *Thompson on Liability of Stockholders*, sec. 329.

This being so, we can perceive no good reason why it should be alleged that this valid and subsisting judgment was also founded upon a valid and subsisting debt.

2. It is claimed that in all bills of the kind here involved, it is essential that it should be alleged in the complaint that the proceedings are for the benefit of all the creditors of the insolvent corporation.

It is true that in actions of this sort the fund realized from the payments by the subscribers to the capital stock was, in equity, equally a fund belonging to all the creditors, and in the distribution of it, if it appeared to the court that there were other creditors than those instituting the suit, it would be the duty of that tribunal to distribute to them their *pro rata* share of the fund.

And this rule proceeds upon the idea that no one creditor can secure the payment of his debt to the exclusion of other creditors: *Handley v. Stutz*, 137 U. S. 369.

But we do not think that under our statute, where the facts are as stated here, viz., that the judgment debt exists, that the corporation is insolvent, that the subscribers owe a certain sum on their unpaid subscriptions, that the execution issuing on the judgment has been returned wholly unsatisfied, and it does not appear from the complaint that there are any

other creditors of the corporation, that it should be held, because of the defect of or misjoinder of other creditors, or the failure to allege that the complaint is filed for the benefit of all creditors, that upon a general demurrer, such as here involved, the complaint is bad.

It would seem that such an objection must be taken by special demurrer, as for a defect or misjoinder of parties plaintiff, where it appears from the face of the complaint, as it does not here, that there are other creditors who should be made parties; or by an answer, if there are other creditors who should be joined: Code Civ. Proc., secs. 430, 433. And if this be not done, the defect or misjoinder is waived: Code Civ. Proc., sec. 434.

None of the cases cited to us involve this precise point; but Mr. Thompson, in his work on the liability of stockholders, has this to say upon the question, at section 351: "It has long been settled that a judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution."

This doctrine seems to be sustained by good authority (*Marsh v. Burroughs*, 1 Woods, 467), where it is also said: "Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf. It is only when it appears to the court, by the subsequent pleadings, or otherwise, that a distribution must be made (as where an executor pleads want of sufficient assets), that a decree will be made for the benefit of all."

The party objecting here is not a creditor who says he has not been made a party, nor does it appear that any such has asked to be made a party, or that there are any other creditors.

It would seem, therefore, that if the defendants were of the opinion that other parties should be joined as plaintiffs, that they should, under our statute, and under the complaint, have pleaded by answer the non-joinder of parties plaintiff.

We are strengthened in our view of this matter from the fact that in *Harmon v. Page*, 62 Cal. 448, where one creditor alone filed a bill, there did not seem to be any question made but

what he could bring the action alone, and it was said: "It appears to us to be well settled that a suit such as was instituted by the plaintiff properly lies in a court of equity, unaffected by any remedy the creditor may have under the provisions of the constitution and the statute."

We perceive no merits in the points made, and advise that the judgment be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

CORPORATIONS — CONCLUSIVENESS OF JUDGMENT AGAINST, AS TO UNPAID STOCK SUBSCRIPTIONS. — A judgment against an insolvent corporation foreclosing a deed of assignment made by it is conclusive on the stockholders as to all corporate matters and property rights in the corporation: *Simple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894, and note. A decree of a court of competent jurisdiction against a corporation is binding upon a stockholder of such corporation, though he is a non-resident not personally served with process: *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156. See extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 858, for a discussion of this subject. See also extended note to *Germantown etc. R'y Co. v. Fuller*, 100 Am. Dec. 552. Parties to an action within the rule making prior judgments conclusive are those who have a direct interest in the subject-matter of the suit and have a right to make a defense: *State v. Costa*, 36 Mo. 437, 88 Am. Dec. 148, and note. Judgments bind parties and privies only, and privity exists only where there is identity of interest: *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278, and note.

CREDITOR'S SUIT — RETURN OF NULLA BONA ON EXECUTION. — A return of *nulla bona* on a judgment against one of two partners is sufficient evidence of inability to secure payment as to him, and authorizes a resort to equity to reach property fraudulently disposed of by him: *Bates v. Cobb*, 29 S. C. 395; 13 Am. St. Rep. 742. After a creditor has established his debt at law, and the property of the debtor has been placed in such a condition or is of such a nature that it cannot be subjected to an execution at law, relief may then be had by the creditor in a court of chancery: *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169, and note; *McGough v. Insurance Bank*, 2 Ga. 151; 46 Am. Dec. 332, and note. See extended note to *Massey v. Gorton*, 90 Am. Dec. 283.

[IN BANK.]

BERRY v. KOWALSKY.

[35 CALIFORNIA, 184.]

OPTION FOR SALE OF WHEAT, COMPLAINT IN ACTION FOR BREACH OF, WHEN SUFFICIENT. — A complaint which alleges that the defendant executed a contract with the plaintiffs, and sets out a copy of the contract, which acknowledged the receipt of one hundred dollars, for which the defendant allowed the agent of the plaintiffs the privilege to deliver to the defendant, at any time within thirty days, five hundred tons of "S/87 wheat," at \$1.80 per cental, and which further alleges that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, which the defendant refused to pay, states a cause of action for the breach of a conditional agreement to buy the wheat at plaintiff's option, and is sufficient as against a general demurrer.

MEANING OF WORDS IN CONTRACT SET OUT IN PLEADING NEED NOT BE PLEADED. — Where a written agreement is fully set out in a pleading, the meaning of words or abbreviations used therein may be proved on the trial for the purpose of enabling the court to interpret them, and the oral evidence of their meaning need not be stated in the pleading.

SURPLUSAGE, MEANINGLESS ABBREVIATIONS DISREGARDED AS, WHEN. — Where a complete contract is expressed without abbreviations employed therein, they may be disregarded as surplusage, if they are meaningless.

ABBREVIATIONS IN DESCRIPTION OF WHEAT NOT UNINTELLIGIBLE OR MEANINGLESS WHEN. — The words, or abbreviations, "S/87 wheat," used in a pleading, cannot be said, on a special demurrer, to be unintelligible or meaningless, nor does their use render the pleading ambiguous or uncertain.

EVIDENCE AS TO MEANING OF ABBREVIATIONS IN CONTRACT AND AS TO PRINTED MATTER THEREIN, WHEN ADMISSIBLE. — Where printed matter, not described in the complaint, consisting of extracts from the rules of the Produce Exchange and Call Board of San Francisco, appears above the written contract pleaded in the complaint, and some of the witnesses testify that the phrase "S/87 wheat," used in the written contract, meant that the seller was to have the season of 1887 in which to complete his contract, and that the wheat should be "number one white wheat," and other witnesses testify that the phrase meant that the wheat was not to be delivered, but that the seller was simply to produce "call-board contracts" for the wheat, evidence ought to be admitted to show whether the printed matter above the manuscript was a part of the contract, or whether it should be considered a "board contract," or whether the phrase had any other meaning than that given to it by said board, and what that meaning is, and also to show what are the rules and regulations of the stock and exchange board, and it is error to exclude such evidence.

THE opinion states the case.

Crittenden Thornton and F. H. Merzbach, for the appellant.

D. H. Whittemore, and Whittemore and Sears, for the respondents.

The COURT. "There are two appeals in this case, upon distinct records. No. 13116 is from the final judgment, and upon the judgment roll. No. 13309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment roll.

"On the appeal from the judgment, it is contended that the court erred in overruling the defendant's demurrer to the complaint, and that the findings do not support the judgment. On the appeal from the order, the errors assigned are errors of law occurring at the trial.

"The following is a copy of the verified complaint: —

"The said plaintiffs complain of the said defendant, and for cause of action herein allege: —

"That on the fifteenth day of July, 1887, the plaintiffs paid to defendant the sum of one hundred dollars for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said fifteenth day of July, at the rate of one dollar and eighty cents per cental; said contract is in the following words and figures, to wit: —

"SAN FRANCISCO, July 15, 1887.

"Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time within thirty days from date five hundred tons S/87 wheat, at one dollar and eighty cents per cental. E. H. KOWALSKY.

"That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest.

"That said plaintiffs, on the thirteenth day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part under said contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars.

"That said plaintiffs made said contract with said defendant in good faith, for the purpose of delivering said wheat to said defendant, and had said wheat in warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant.

“Wherefore plaintiffs pray for judgment against said defendant, in the sum of eighteen thousand dollars, interest, and costs of suit, and for such other and further relief as justice may require.

WHITTEMORE AND SEARS,

“Att'ys for Plaintiff.”

“This complaint was demurred to, on the ground, — 1. That it is ambiguous, unintelligible, and uncertain, in that ‘no meaning is alleged of the words “S/87,” in the contract’; and 2. That the defendant does not state facts sufficient to constitute a cause of action.

“The alleged contract is not, does not purport to be, and is not alleged to be an agreement to ‘sell and buy,’ nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor: Civ. Code, secs. 1726–1730; Wharton on Contracts, sec. 453 a. Nor is the action brought to recover the price or value of wheat ‘sold and delivered,’ or ‘bargained and sold,’ but to recover damages for defendant’s breach of his alleged conditional agreement to buy the wheat at plaintiffs’ option.

“1. As against a general demurrer, I think the facts expressed and implied in the complaint barely constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterwards alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of one hundred dollars, for which defendant ‘allows’ (gives) plaintiffs the ‘privilege’ (option) to deliver (or not) to defendant, within thirty days, five hundred tons of wheat, ‘at (the price of) one dollar and eighty cents per cental.’ The giving of the privilege to deliver the wheat to defendant at a certain price implies that he will receive and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement, it is alleged that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, thus creating the condition

upon which defendant's liability depended, and that defendant refused to pay the price. This shows a breach of the agreement, for which the plaintiffs were entitled to such damages as proximately resulted therefrom.

"2. The grounds of the special demurrer — that the 'complaint is ambiguous, unintelligible, and uncertain' — do not appear on the face of the complaint. The words, or abbreviations, 'S/87,' appear to have been used as descriptive of the wheat, and to require oral evidence of their customary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out *in hæc verba*. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words: Civ. Code, secs. 1636, 1644-1646; *Callahan v. Stanley*, 57 Cal. 476. Had it appeared on the face of the complaint, that even with the aid of parol evidence, the words 'S/87,' as used, were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage: *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain unambiguous meaning descriptive of the subject of the contract. Therefore the court could not see on the trial of the demurrer that those words were unintelligible, or that their use rendered the complaint ambiguous or uncertain.

"3. The execution of the contract and the breach thereof, as alleged, are found as facts. Therefore the findings support the judgment.

"4. The contract as set out in the complaint being denied, it appears by the statement on motion for new trial that to prove the contract plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter composed of what was admitted to be extracts from the rules of the Produce Exchange and Call Board of San Francisco. The paper was objected to by counsel for defendant, on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon, for the apparent purpose of proving that the printed matter was no part of the contract, and that the 'contract was entirely independent of the printed heading, the plaintiff Berry, on behalf

of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations—all that was said by each party—preceding and leading up to the signing of the written contract, which he said was drawn by him according to the verbal understanding. He was further permitted to testify, against the objection of defendant's counsel, that the 'contract was drawn independent of any connection with what is known as the Produce Exchange. . . . I was not figuring on the contract on the board. It was business outside. . . . I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant.'

"F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the Produce Exchange and Call Board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that he was present when the contract in suit was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to, on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting.

"Q. Was there any reference had, in the conversation between these parties, to what was known as the call-board contract?

"Q. Was anything said about the contract, which was to be entered into between the parties, being governed, or to be complied with, or performed under the rules of the San Francisco Produce Exchange and Call Board?

"Q. Was the term "board contract" used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?"

"The defendant's counsel also offered in evidence all the rules and regulations of the Produce and Exchange Call Board, but upon objection by plaintiffs' counsel they were excluded by the court.

"It appears that Gerberding (in whose name the contract was made) was a member of the exchange board at the date of the contract. The defendant at the same time owned a seat

in the board, but was not then occupying it, having leased it temporarily to another person. The plaintiff Berry had formerly been a member of the board.

"As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a 'board contract,' and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting."

(The foregoing is adopted from the opinion of Commissioner Vanclef, delivered in Department.)

It is testified that the phrase "S/87 wheat," used in the contract sued on, is an abbreviation which originated in the call board, where, from the necessities of business, such a phrase is understood to mean what it would take quite a number of words to express in detail. It was testified by most of the witnesses that "S/87 wheat" meant that the seller was to have the season of 1887 in which to complete his contract, and that it meant also that the wheat should be "number one white wheat." There was also testimony to the point that the said phrase "S/87 wheat" does not mean that the one party is to actually deliver the amount of wheat stated in the contract, or that the other party is bound to receive it all and pay the whole amount at the stated price; but that the seller is simply to produce what are denominated "call-board contracts" for the wheat, instead of the wheat itself. And owing to the peculiar character of the contract here sued on, and the testimony as to the technical meaning of some of its terms, we think that the court could not arrive at a just decision of the case without knowing whether the printed matter was a part of the contract, whether it should be considered as a "board contract," and whether the phrase "S/87 wheat" has any meaning other than that given to it by said board, and what that meaning is. The solution of these questions involves matters of fact to be determined upon evidence. We think, therefore, that the testimony of plaintiff Berry when testifying for plaintiffs was properly admitted over the objections of defendant, and that the court erred in sustaining objections to the questions asked by defendant of the witness Bonney, as above stated, and also in sustaining the objections to the introduction of the rules and regulations of the stock exchange and call board. The contract may turn out to be a pure gambling contract, and therefore void; but from any point of view,

the said evidence offered by defendant should have been admitted.

Judgment and order reversed, and a new trial ordered.

PLEADING — COMPLAINT IN ACTION FOR BREACH OF CONTRACT. — A breach of contract may be alleged affirmatively or negatively by using the words of the contract, provided the affirmation or negation in that form necessarily amounts to a breach: *Atlantic etc. Ins. Co. v. Young*, 38 N. H. 451; 75 Am. Dec. 200, and note. A declaration that a defendant agreed to do a certain thing at a certain time and place is sufficient without alleging demand and refusal, since, to excuse himself, he must show in his answer either that he did the thing or was ready to do it: *Patterson v. Jones*, 13 Ark. 69; 56 Am. Dec. 296.

EVIDENCE, PAROL — ADMISSIBILITY OF, TO EXPLAIN MEANING OF WORDS IN WRITTEN INSTRUMENT. — Marks and technical terms pertaining to a particular business, used in a written instrument, may be explained by parol evidence: *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *Dana v. Fiedler*, 12 N. Y. 40; 62 Am. Dec. 130, and note; *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154; *Ganson v. Madigan*, 15 Wis. 144; 32 Am. Dec. 659, and note. If a word is used in an instrument which has no definite and specific general meaning, its local meaning may be proved: *Galena Ins. Co. v. Kepsfer*, 28 Ill. 332; 81 Am. Dec. 284, and note.

TOWNSEND v. TUFTS.

[95 CALIFORNIA, 257.]

VENDOR AND PURCHASER — COMPLAINT IN ACTION TO RECOVER PURCHASE-MONEY PAID INSUFFICIENT WHEN. — A complaint in an action to recover money paid upon a contract for the purchase of land which alleges that by the terms of the contract the amount sued for was to be paid down and the remainder of the price in two equal installments, and that the vendor was, upon the payment of the last installment, to execute and deliver a deed of the land, that time was, by express terms, made the essence of the contract, and that at the maturity of the contract the vendors failed and refused to convey, but which does not allege payment of the deferred installments, nor any tender or offer to pay either of them, nor any demand for a deed, nor any inability to convey, nor any rescission of the contract, does not state a cause of action.

TENDER OF PURCHASE-MONEY DUE AND DEMAND FOR DEED ESSENTIAL TO RECOVERY OF PURCHASE-MONEY PAID. — The mere neglect of both parties to a contract for the purchase of land, by which it is agreed that a portion of the purchase-money should be paid down and the remainder in two equal annual installments, upon the payment of the last of which the vendor was to convey the land, to perform the contract on the day fixed for its performance, cannot, without anything more, operate as a rescission of the contract; and when the complaint in an action to recover the amount paid down on the contract shows a first breach of the contract by the purchaser, by his failure to pay the first deferred payment, a full

year before the vendors were required to convey, a tender by the purchaser of the remainder of the purchase-money due and a demand for a deed are essential to a recovery in such action, and it is not enough to allege a refusal of the vendors to execute and tender a deed at the time fixed for the conveyance.

THE opinion states the case.

Jones and Carlton, and R. L. Horton, for the appellant.

Albert M. Stephens, for the respondents.

HAYNES, C. Defendants demurred to the complaint, the demurrer was sustained, and the plaintiff having declined to amend, judgment passed for defendants, from which judgment the plaintiff appeals.

The facts alleged in the complaint are, that on March 6, 1888, the defendants entered into a contract with one Parkovitch, whereby they agreed to sell, and said Parkovitch agreed to buy, a certain parcel of land for the sum of two thousand four hundred dollars, of which sum one third was paid down, and the remaining two thirds was agreed to be paid in two equal annual payments, the last of which fell due March 6, 1890, "at which time," the complaint alleges, "by the terms of said agreement, defendants were to execute and deliver to said Parkovitch or his assigns a good and sufficient deed of grant, bargain, and sale, conveying to him or his assigns the title to said land."

The complaint further alleges that time was made the essence of the contract by express terms; that on March 28, 1889, Parkovitch assigned said contract, and all sums of money paid thereon, to the plaintiff, of all which defendants had notice; that at the maturity of the contract defendants failed and refused, and ever since have failed and refused, to convey; that neither plaintiff nor Parkovitch have ever been in possession (the lands being vacant and unoccupied); and that defendants have not paid to plaintiff any part of the eight hundred dollars so received by them.

The complaint contains no allegation of the payment, nor of any tender or offer to pay either of the deferred payments, nor of any demand for a deed of conveyance, nor of any inability to convey, nor of any rescission, mutual or otherwise, of the contract, unless the failure of the defendants to make and tender a deed to the plaintiff on the sixth day of March, 1890 (that being the day specified in the contract for the payment of the last installment of the purchase-money and for

the conveyance of the land), should be held to operate as a rescission or termination of the contract; and this is the sole ground upon which appellant seeks to reverse the judgment.

The appellant contends that by the failure of defendants to tender a deed on that day the contract ceased to exist, and that thereupon he became entitled to recover back the money paid; and cites *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; and *White v. Buell*, 90 Cal. 177.

The last two cases cited are clearly distinguishable from the case under consideration. In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, the plaintiff paid one thousand dollars upon the execution of the agreement, but failed to pay the seven thousand five hundred dollars when the same became due, and never offered to pay the same until about ten months after maturity, when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund the one thousand dollars paid, and elected to rescind the agreement. Thereupon the plaintiff brought suit to recover the one thousand dollars, and alleged in his complaint the facts above stated, as well as a portion of the contract which provided that upon his failure to make the deferred payment the defendant should be released from all obligation to convey, and all money paid thereon should be as liquidated damages for plaintiff's non-fulfillment of the contract. Under these circumstances, this court held that the plaintiff was entitled to recover the one thousand dollars paid by him, less such actual damages as the defendants might have sustained by plaintiff's breach of the contract, if such damages had been pleaded, following in this respect *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187. In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, it must be observed there was a tender by the plaintiff, a demand for a deed, and an express rescission of the contract by the defendant, as was his right under the terms of the contract, and that the plaintiff acquiesced in the rescission by bringing his suit. In the case at bar, however, there was no tender of payment or demand for a deed, and hence the defendants were not called upon to elect whether they would insist upon performance, as they might have done under the authority of *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, *Smith v. Mohn*, 87 Cal. 489, and *Banbury v. Arnold*, 91 Cal.

606; and that being true, the mere neglect of both parties to perform the contract on the day fixed for its performance could not, without anything more, operate as a rescission. The complaint, it is true, alleges that defendants "failed and refused" to execute to plaintiff a deed; but in the absence of an allegation of tender of the purchase-money and demand for a deed, this allegation must be read in the light of the terms of the contract, which does not make the execution and delivery of the deed a condition precedent to the payment of the last installment of the purchase-money, but does fix the time for the execution of the deed at the time fixed for such final payment.

Under the well-settled authorities, the plaintiff, under the terms of this contract, must have tendered performance and alleged such tender, to enable him to maintain his action, unless he could excuse his failure to make the tender by alleging his ability and readiness to pay, and that the tender was not made because of defendants' refusal to perform on their part. Besides, in the absence of an allegation that the first deferred payment had been made, the plaintiff having specified, and seeking to recover, only the payment made at the date of the contract, the complaint shows a breach of the contract on his part a full year before defendants were required to convey.

In *White v. Buell*, 90 Cal. 177, cited by counsel, the purchaser had the right, under the contract, to terminate it by forfeiting the first payment of one thousand dollars, his failure to pay either the first or second deferred payments operating, by the express terms of the contract, as a termination of it, the penalty therefor being the forfeiture of the payment made at the date of the contract only, and not of the subsequent payment, which he was permitted to recover back.

Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, also cited by counsel for appellant, has been overruled upon the point to which it is cited in *Newton v. Hull*, 90 Cal. 487.

The complaint contains four counts or causes of action, each upon a separate contract, but as all are stated in the same terms and allege the same facts, it is not necessary to notice them further.

For the reasons above given, we advise that the judgment be affirmed.

VANOLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

VENDOR AND PURCHASER — RECOVERY OF PURCHASE-MONEY. — An action for money had and received is the proper remedy to recover the consideration paid for a conveyance of land, if the circumstances are such that the plaintiff has the right to rescind the sale, and has done everything on his part necessary to such rescission: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178, and note. A purchaser of land cannot maintain an action upon a contract of sale which he has no right to rescind, without full performance on his part prior to the vendor's default; and without alleging and proving such performance, he cannot maintain an action to recover purchase-money paid in part performance of his contract while it is still uncompleted: *Easton v. Montgomery*, 90 Cal. 307; 25 Am. St. Rep. 123, and note. C. agreed to purchase certain lands of B. and to pay the purchase price in installments, for which he gave notes to B., and upon the payment of the last due note at maturity, B. was to execute a deed to C. C. paid all but the last note, and when that was due he was not ready to pay it, but B. did not tender a deed of the land, and afterwards sold it to another party. It was held that B., not having tendered the deed to C. at the proper time, failed to put C. in legal default, was equally derelict with him, and having sold the land, C. was entitled to recover the amounts he had paid under the contract: *Boston v. Clifford*, 68 Ill. 67; 18 Am. Rep. 547. Where the payment of the purchase-money and a tender of the deed are to occur at the same time, they are to be considered as concurrent acts which disable either party from putting an end to the contract without performance or a valid offer to perform on his part: *Friak v. Thomas*, 20 Or. 265. See also *Rhorer v. Bila*, 83 Cal. 51.

BROWN v. O'NEAL.

[95 CALIFORNIA, 262.]

STATUTE OF FRAUDS — CHANGE OF POSSESSION NECESSARY ON SALE OF PERSONAL PROPERTY OWNED BY CO-TENANTS WHEN. — When one of the co-tenants of personal property, who is in the exclusive possession thereof, sells his interest in it to a third person, there must be an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code of California, or the sale will be void as to the seller's creditors.

TRANSFER OF PERSONAL PROPERTY WITHOUT CHANGE OF POSSESSION VOID AS TO CREDITORS WHO ARE SUCH WHILE SELLER REMAINS IN POSSESSION. — A transfer of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void as against those who are the creditors of the seller during any of the time that he remains in possession, and such creditors may cause the property to be seized as if no such transfer had been attempted by the debtor.

J. M. Wilcoxson, and Wilcoxson and Bouldin, for the appellant.

Graves and Graves, for the respondent.

BELCHER, C. This is an action to recover possession of a horse, alleged to have been wrongfully taken by the defendant from the plaintiff, or in case delivery cannot be had, for the value of plaintiff's one-half interest in the animal, and damages for its detention.

The facts of the case, as found by the court below, are substantially as follows:—

On February 5, 1890, R. S. Brown and W. H. Taylor were the joint owners of a stallion, each owning a half-interest. Taylor was an invalid, and Brown, by agreement between them, had possession of the animal, and was to manage him during the breeding season of that year, lasting from February 1st to July 15th, and after paying all expenses, divide equally the proceeds arising from his services.

On the day named, Brown sold, and by bill of sale conveyed, all his interest in the stallion to W. J. Brown, the plaintiff, for the sum of \$650, which sum was paid by plaintiff at the time. Taylor was spoken to about the sale at the time it was made, and refused to give his consent thereto unless the seller should retain possession of the stallion. Plaintiff consented to this arrangement, and the horse remained in possession of R. S. Brown until about February 1, 1891, when Taylor, plaintiff, and R. S. Brown entered into a new agreement, whereby the latter was to have the possession, control, and management of the stallion during the breeding season of that year, and pay all expenses of his keeping, care, and management, and receive one third of the proceeds derived from his services, and the other two thirds of the proceeds were to be equally divided between Taylor and the plaintiff.

On March 15, 1891, R. S. Brown and P. W. Murphy jointly executed their promissory note to the Bank of San Luis Obispo for the sum of \$1,057.30, due one day after date. On April 7, 1891, the note not being paid, the bank commenced an action thereon in the superior court of San Luis Obispo County, and took out a writ of attachment. The writ was placed in the hands of the defendant, who was then the sheriff of the county, and under it he as such sheriff levied upon, seized, and took into his possession the said stallion.

The value of the stallion was three thousand dollars, and the levy of the attachment upon him, as aforesaid, constitutes the taking alleged in the complaint.

The plaintiff demanded the return of the animal to himself,

and his demand being refused, he commenced this action on April 10, 1891.

Upon these facts the court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll.

The first question presented for decision is, Was the sale void, as against the creditors of the seller, under the provisions of section 3440 of the Civil Code? The section is as follows:—

“Every transfer of personal property . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession,” etc.

Appellant contends that this section has no application to the case, for the reason that “the property sold—an undivided interest in a stallion—was not capable of delivery”; and as the other joint owner objected and refused to consent to a change of possession of the animal, no actual change was necessary. “In other words,” he says, “his position is that the possession of Taylor was the possession of plaintiff, and that from the time of the sale the property was in Taylor’s possession; and the possession of one joint tenant being the possession of the other, that plaintiff at all times after the transfer was in possession of the horse.”

If Taylor had sold his interest in the horse, and one of his creditors had afterwards taken it under attachment, the rule invoked would have been applicable, but it is not applicable to the facts shown here. The law on this subject is stated in Freeman on Cotenancy, sec. 167, as follows: “If A and B together own personal property of which A is in actual possession, and B sell his moiety to C, the possession of A immediately becomes the possession of C also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A, it is not necessary that C should take actual possession with A, to make his purchase good under the statute of frauds, as against the creditors of B. If A, the co-tenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no co-tenant whose actual possession could have operated for the benefit of A’s vendee.” And again, in his work on executions, sec. 153, the same author says: “If the co-tenant selling is in the sole possession,

he ought to give possession to his vendee; but if the other cotenants are in possession, the vendor has no right to take it from them. He may, therefore, from necessity, make a valid sale without placing the property in the custody of his vendee." And see *Brown v. Graham*, 24 Ill. 680, and *Newell v. Desmond*, 63 Cal. 242.

The law being as above stated, it is clear that judgment was properly entered against the appellant, unless his second contention can be sustained. That contention is, that the Bank of San Luis Obispo was not a creditor of Brown until more than a year after the sale, and consequently was not in a position to attack the sale. And it is said: "The statute, we think, visits no such penalty upon a *bona fide* purchaser as to declare a transfer void as to subsequent creditors."

The obvious answer to this position is, that the statute, section 3440 of the Civil Code, "denounces the transfer as fraudulent and void as against the claims of a creditor who is such creditor during any of the time that the person who made the transfer remains in possession after a transfer which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor": *Watson v. Rodgers*, 53 Cal. 401. The law is so written, and though it may sometimes seem to work a hardship, the courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser or the good faith of the transaction: *Woods v. Bugbey*, 29 Cal. 467.

It results that the judgment should be affirmed, and we so advise.

HAYNES, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

SALES — NECESSITY FOR DELIVERY. — Retention of possession by the seller upon a sale of chattels, in itself, makes the transaction fraudulent as to subsequent *bona fide* creditors and purchasers: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note; *Davis v. Bigler*, 62 Pa. St. 242; 1 Am. Rep. 393; *Remington v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692, and note; *Oochrons v. Gibert*, 41 La. Ann. 735. To render a sale of chattels valid as against the creditors of the vendor and subsequent purchasers from him, the vendee must take actual possession of them: *Clafin v. Rosenberg*, 42 Mo. 439; 37 Am. Dec. 336, and extended note; *McDonough v. Prescott*, 62 N. H. 600.

Where a sale of chattels is not followed by an actual and continued change of possession, the burden of proof is upon the vendee to show that the sale was made in good faith: *Clark v. Lee*, 78 Mich. 221.

A sale of personal property not followed by delivery was, at common law, void, but under the Oregon statute it is valid as to creditors, if the bill of sale is recorded within ten days: *Monroe v. Hussey*, 1 Or. 188; 75 Am. Dec. 552, and note. Although a sale of goods without delivery of possession is void as to existing creditors, yet as to subsequent creditors it is fraudulent only as to those in fact intended to be defrauded: *Ditman v. Rauls*, 124 Pa. St. 225.

LATTIN v. GILLETTE.

[95 CALIFORNIA, 317.]

STATUTE OF LIMITATIONS — TWO-YEARS CLAUSE APPLICABLE TO LIABILITIES ARISING FROM TORTS. — Section 339 of the California Code of Civil Procedure, which provides that an action upon a contract, obligation, or liability not founded upon an instrument in writing must be brought within two years after the cause of action shall have accrued, is applicable to all actions at law not specifically mentioned in other portions of the statute, and to liabilities arising in consequence of torts committed.

STATUTE OF LIMITATION BEGINS TO RUN AGAINST ACTION FOR NEGLIGENCE AS SOON AS NEGLIGENCE IS COMPLETED. — The statute of limitations begins to run against an action for misconduct or negligence from the date when the act of misconduct or negligence is completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract or the affirmative disregard of some positive duty.

TIME OF LIMITATION NOT PROLONGED BY WANT OF KNOWLEDGE OF NEGLIGENCE. — The right to maintain an action for negligence is distinguished from the measure of damages, and although the entire damage resulting from the negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

SEARCHER OF RECORDS — LIABILITY OF, FOR NEGLIGENCE — STATUTE OF LIMITATIONS. — One who holds himself out as an examiner of titles is bound to exercise skill and care in making such examination, and is liable in damages for a failure to do so, but an action against him for damages resulting from his negligence in examining and reporting upon the condition of the title to real estate must be commenced within two years from the giving of the report, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land through a suit determined within two years before the commencement of the action for damages.

STATUTE OF LIMITATIONS — CERTIFICATE OF TITLE GIVEN BY SEARCHER OF RECORDS NOT WITHIN FOUR-YEARS CLAUSE OF. — Section 337 of the California Code of Civil Procedure, prescribing a four-years limitation, refers to contracts, obligations, or liabilities arising from instruments of writing executed by the parties who are sought to be charged, in favor of

those who seek to enforce the contracts, obligations, or liabilities, but does not apply to a certificate of title given by a searcher of records, where damages are claimed for his negligence in giving an incorrect certificate.

J. D. Bethune and A. W. Hutton, for the appellant.

Chapman and Hendrick, for the respondents.

HARRISON, J. In June, 1886, the plaintiff employed the defendants, who were engaged at Los Angeles in the business of searching public records and examining titles to real estate, to examine the title of one Birnbaum to a tract of land in Los Angeles County, for which he had made a contract of purchase, and ascertain if his title was good, and paid them one thousand dollars for their services. The defendants, under said employment therein, made a report to the plaintiff, and gave him a certificate in writing, on the twelfth day of June, 1886, that the title to the land was vested in Birnbaum, free of all encumbrances. Thereupon the plaintiff purchased and paid for the land. Afterwards, and within two years prior to the commencement of this action, a suit was brought in the superior court of Los Angeles County in reference to the title to said land, which the plaintiff was subjected to the cost and expense of defending, and in which a judgment was rendered, to the effect that at the date of said certificate an undivided one half of said land was vested in the heirs of one Smith, and the plaintiff herein was thereupon deprived of the said half of the land. In May, 1890, he commenced this action against the defendants for damages resulting from their negligence in the examination and report upon the condition of the title. Defendants demurred to the complaint, upon the ground, among others, that the suit was not brought until more than two years after the cause of action had accrued, and was therefore barred by the statute of limitations. The court sustained the demurrer to the complaint, and judgment was rendered against the plaintiff, from which he has appealed.

Section 339 of the Code of Civil Procedure provides that an action upon a "contract, obligation, or liability," not founded upon an instrument in writing, must be brought within two years after the cause of action shall have accrued. This provision was declared in *Piller v. Southern Pac. R. R. Co.*, 52 Cal. 44, to be "applicable to all actions at law not specifically mentioned in other portions of the statute." The word "liability" is the most comprehensive of the several terms used

in this section, and includes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him. It is defined by Bouvier to be "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed"; and this definition was approved in *Wood v. Currey*, 57 Cal. 209.

The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract, the statute begins to run at the date of the breach, and a right of action growing out of the negligence of another accrues whenever the act of negligence is complete. "When misconduct or negligence constitutes a cause of action, the statute of limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence": *Wood v. Currey*, 57 Cal. 209. Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case, the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages, which are the measure of such liability, may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

In the present case, the obligation assumed by the defendants arose out of their agreement that they would examine the title of the property, and ascertain if the same was good in Birnbaum, and report the same to the plaintiff. Having held themselves out as examiners of titles, they were bound to exercise skill and care in making such examination, and became liable in damages for a failure to exercise such skill and care; and the breach of their agreement, for which they became liable, is alleged in the complaint to have been that they "negligently and unskillfully conducted such examination, and did not truthfully report the condition of the title to the plaintiff," but reported, on the 12th of June, 1886, that the title was vested in Birnbaum, free of all encumbrances; whereas, in fact, at the

date of said certificate he was the owner of only an undivided one half thereof, and the same "appeared of record on the public records of said county." The giving of this certificate was the breach of their agreement, and constituted the negligence for which they became liable. No further or subsequent act was done or contemplated to be done by them under their employment. Their liability for this negligence, if any existed, arose immediately, and an action therefor could have been immediately commenced against them, and unless commenced within two years thereafter, was barred by the statute of limitations.

The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired. The judgment of the court did not constitute the negligence of the defendants, but was only evidence that they had been guilty of negligence; and the eviction of the plaintiff under such judgment was not the cause of action against the defendants, but was merely an element in determining the amount of damages that he had sustained by reason of their negligence. "Where an attorney is sued for malpractice, the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not": Wood on Limitations, sec. 122. In cases of damages resulting from malfeasance or misfeasance, "the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned": Angell on Limitations, sec. 136. "In actions for official or professional negligence, the cause of action is founded on the breach of duty which actually injured the plaintiff, and not on consequential damage. Thus in an action against an attorney for neglect of professional duty, it has been held that the statute of limitations begins to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued": 2 Greenl. Ev., sec. 433. In *Troup v. Smith*, 20 Johns. 33, a surveyor had been employed to survey a tract of land into lots suitable for sale, but did his work so unskillfully as to cause damage to the plaintiff, for which he brought suit, and to a plea of the statute of limitations replied that the error was not discovered by him for some years after the survey had been completed, but it was held by the court that this fact did not impair the effect

of the plea; that the cause of action accrued at the completion of the survey, and not at the time of the discovery of its character, and was barred by the lapse of six years.

In *Argall v. Bryant*, 1 Sand. 98, an action was brought against the publishers of the Evening Post for the erroneous publication therein of a legal notice, whereby the plaintiff sustained damage. The publication was made in 1835, but the error was not discovered until 1842, and the damage resulting therefrom in a judgment recovered against the plaintiff was not sustained until 1846, upon the payment of which suit was immediately brought for the negligence. It was held that the foundation of the action was the implied promise of the defendant to perform with care and diligence the publication which he undertook, and that this implied promise was broken in 1835, when the error was committed, and that as an action could have been then maintained, the statute of limitations began to run, and was not affected by the fact that he did not discover the error until a later date, or that he subsequently sustained additional damages. In *Wilcox v. Plummer's Ex'rs*, 4 Pet. 172, an attorney who had been employed to collect a promissory note was guilty of such negligence in bringing the suit that the indorser was discharged. It was held that the ground of action against the attorney was the breach of his contract to act diligently and skillfully, and arose at the time he committed the blunder in issuing the writ, and not at the determination of the suit. See also *Howell v. Young*, 5 Barn. & C. 259; *Short v. McCarthy*, 3 Barn. & Ald. 626; *Kerns v. Schoonmaker*, 4 Ohio, 331; 22 Am. Dec. 757; *Northrup v. Hill*, 57 N. Y. 356; 15 Am. Rep. 501; *Moore v. Juvenal*, 92 Pa. St. 484; *Crawford v. Gaulden*, 33 Ga. 174; *Lilly v. Boyd*, 72 Ga. 83.

The written certificate of title given to the plaintiff by the defendants, although an instrument in writing, is not an instrument upon which their liability is founded. In *Chipman v. Morrill*, 20 Cal. 131, it was held that this provision of the section by its language "refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately, — that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities." The contract which is the basis of the plaintiff's cause of action herein does not "rest in" or "grow out"

of this certificate, nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligation assumed by them was that created at the time of their acceptance of the employment by the plaintiff, and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given. As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing.

The judgment is affirmed.

LIMITATIONS OF ACTIONS FOR NEGLIGENCE OR TORT. — The statute of limitations operates in favor of an attorney in an action against him for negligence in not procuring a judgment to be entered and execution issued from the time when, through the failing circumstances of the debtor, rendering a loss probable and calling for diligent action, the actual neglect in forbearing to cause the judgment to be entered and execution issued occurred: *Thomas v. Ervin*, Cheves, 22; 34 Am. Dec. 586. The statute of limitations does not begin to run against a cause of action for injury through a defendant's negligence until the injury is received, although the negligence was committed thirteen years prior: *Board of Commissioners v. Pearson*, 120 Ind. 426; 16 Am. St. Rep. 325.

LIMITATIONS OF ACTIONS — TIME OF, NOT PROLONGED BY WANT OF KNOWLEDGE. — The statute of limitations begins to run when the cause of action accrues, not from the time the knowledge of the fact comes to the plaintiff: *Fee v. Fee*, 10 Ohio, 469; 36 Am. Dec. 103, and note; *Thrower v. Cureton*, 4 Strob. Eq. 155; 53 Am. Dec. 660, and note; *Farris v. Coleman*, 103 Mo. 352. But the statute of limitations in equity runs from the time of the discovery of a mistake; laches cannot be imputed before that time: *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185, and note.

ABSTRACTORS OF TITLE — TO WHOM LIABLE FOR NEGLIGENCE. — The maker of an abstract of title to real property, guaranteed by him to be correct, is liable in damages to the purchaser of such property who relied upon the abstract, if recorded conveyances are omitted therefrom to his injury, though the abstract was made at the expense and request of the owner of the property: *Dickle v. Abstract Co.*, 89 Tenn. 431; 24 Am. St. Rep. 616, and note.

HIGH v. BANK OF COMMERCE.

[95 CALIFORNIA, 286.]

PROCEEDINGS SUPPLEMENTARY TO EXECUTION — STATUTE AUTHORIZING JUDGMENT CREDITOR TO SUB NOT UNCONSTITUTIONAL. — Where jurisdiction is once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied, and proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action. Section 720 of the California Code of Civil Procedure, which provides that the judge may, by order, authorize a judgment creditor to institute and maintain an action against an alleged debtor of the judgment debtor, is not therefore unconstitutional on the ground that the debtor has under it no notice of the supplementary proceedings after judgment affecting his rights of property, nor on the ground that his debtor may be compelled to pay the debt twice.

COMPLAINT IN ACTION AGAINST GARNISHEE IN SUPPLEMENTARY PROCEEDINGS, WHEN SUFFICIENT. — A complaint in an action by a judgment creditor against a garnishee, in proceedings supplementary to execution, in which it is alleged that the assignor of the plaintiff recovered a judgment in the superior court, which judgment was duly entered, etc., and that the order authorizing the suit was duly made, is sufficient as against a general demurrer.

D. L. Withington, for the appellant.

Luce and McDonald, for the respondent.

FOOTE, C. The plaintiff became the assignee of a judgment obtained by one Keturah White against N. A. Comstock and Carl Trotsche and W. E. High. He brought this action against the defendant here, as garnishee of Comstock and Trotsche, in proceedings supplemental to execution, under the provisions of the Code of Civil Procedure contained in sections 716 to 720, inclusive.

A demurrer to the complaint was filed by the defendant, to the effect that the pleading in question did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declining to amend the complaint, judgment was rendered for the defendant, from which the plaintiff prosecutes this appeal.

The first contention of the respondent which we will notice is that in which he asserts that section 720 of the Code of Civil Procedure is unconstitutional. He bases this view of the matter upon a decision of the appellate court in *Bryant v. Bank of California*, 8 Pac. Rep. 644, where it is said by Mr. Justice Myrick: "Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil

Procedure is provided for, we are of opinion that that section, which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor, is unconstitutional and void. This not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor, who might otherwise be compelled to pay twice."

It has been held in *Hexter v. Clifford*, 5 Col. 168, in reference to a statute similar to that of California, that no such notice is required; and this seems to be the view entertained in New York with reference to the qualification that notice may be given, in the discretion of the judge: 4 Wait's Practice, 131.

Jurisdiction having been once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied. Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action: 4 Wait's Practice, b, p. 128.

So far as the judgment debtor is concerned, he cannot complain; he is a party to the judgment, and is fully aware of the legal effect of it, viz., that what his debtors owe him can be applied, by proper proceedings in the action which is still pending, to the satisfaction of his judgment debts; and due process of law has been had to make him aware of that fact. If, then, anything is due from his debtor, he is not injured if it is so applied. If nothing is due him from such debtor, then the matter is of no concern to him.

The debtor of the judgment debtor is not to be permitted to say that he cannot protect himself against paying the debt twice, first to the creditor of the judgment debtor in this proceeding, and then to the judgment debtor who has no notice of the proceeding; the reason for this being that the debtor of the judgment debtor is not without a remedy to prevent this result in the proceeding itself, in that all he is required to do to accomplish that result is, that he suggest that his creditor, the judgment debtor, be made a party to the proceeding; and since he can protect himself, it is idle to say he may be compelled to pay his debt twice.

The statute in question must be held to contemplate this, and not that any such thing could be accomplished as that the debtor of a judgment debtor might, under its provisions,

be made to pay a debt twice. We therefore see no force in the suggestion that the statute is unconstitutional, in that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property. And the contention is equally without force that such has been the decision binding on the appellate court in *Bryant v. Bank of California*, 8 Pac. Rep. 644.

In *Collins v. Angell*, 72 Cal. 513, Mr. Justice McFarland, speaking for the court, virtually declares that no constitutional question was decided in the case first mentioned. And it appears from 7 Pac. Rep. 131, where the case on which the respondent relies was first determined in Department, and in 8 Pac. Rep. 644, where the same case was heard in Bank, that at the most only three of the judges took the view contended for by respondent.

But the respondent contends further, that the complaint does not show that the judgment made the basis for this proceeding is valid, and that it is not shown by that pleading that a valid order was made authorizing the proceeding to be commenced.

The allegation in question relative to the judgment is: "That upon the second day of March, 1891, Keturah White recovered a judgment in this superior court, . . . which judgment was duly entered," etc.

The respondent says that this is not a sufficient statement to show that the judgment "was duly given."

In *McCutcheon v. Weston*, 65 Cal. 39, it was held that an averment that a judgment was "recovered, entered, and docketed" was sufficient.

As this docketing is only to fix a lien of the judgment already entered in the judgment-book on the real property of the debtor (Code Civ. Proc., sec. 671), we do not think it essential to aver such docketing to show that the judgment was "duly given," if it is already averred that it was "recovered" and "entered."

As to the insufficiency of the averments with reference to the order authorizing suit, it seems that as against a general demurrer the allegation that it was "duly made" is sufficient, even if the specific facts set out are defective, which we do not decide: *Dore v. Thornburgh*, 90 Cal. 66; 25 Am. St. Rep. 100; *Bull v. Houghton*, 65 Cal. 422.

We therefore conclude that the demurrer was improperly

sustained, and that the judgment appealed from should be reversed, and so advise.

VANCLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed. —

EXECUTION — PROCEEDINGS SUPPLEMENTARY TO. — The jurisdiction of the judge continues until all orders concerning the property of an execution debtor have been obeyed, where proceedings in aid of execution have been regularly instituted: *In re Morris*, 39 Kan. 28; 7 Am. St. Rep. 512, and note. Payment by the debtors of a judgment debtor, in obedience to an order made in a proceeding supplementary to execution, is a valid payment, although no notice of the proceedings is given to the judgment debtor: *Gibson v. Haggerty*, 37 N. Y. 555; 97 Am. Dec. 752, and note citing cases.

FLEMING v. FLEMING.

[95 CALIFORNIA, 430.]

DIVORCE — EXTREME CRUELTY AS GROUND FOR — HOW DETERMINED. —

What acts of a spouse constitute extreme cruelty within the meaning of a statute making this a ground for a divorce cannot be defined with precision, but each case is to be determined according to its own peculiar circumstances, by the court or jury keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.

DIVORCE — GRIEVOUS MENTAL SUFFERING, WHAT IS, IS A QUESTION OF FACT.

— Whether or not, in any given case, one of the spouses has inflicted upon the other grievous mental suffering, is a pure question of fact, to be deduced from all the circumstances of such case.

DIVORCE — FINDING RESPECTING GRIEVOUS MENTAL SUFFERING CONCLUSIVE WHEN. —

When a complaint by a wife, in an action for divorce on the ground of extreme cruelty, charges that the defendant attempted to have sexual intercourse with their domestic, and that his conduct received great publicity on account of a complaint having been made by the domestic before a magistrate charging the defendant with assault with intent to commit a rape upon her, and that afterwards he threatened to turn the plaintiff out upon the world penniless unless she would help him to keep the domestic from prosecuting him on the complaint, and that such conduct on the part of defendant, and the publicity given to it, caused the plaintiff grievous mental suffering, thereby greatly impairing her health, it cannot be said, as a matter of law, that such conduct did not inflict grievous mental suffering upon her, and a finding by the court that it did is, in the absence of evidence in the record, conclusive upon appeal.

DIVORCE — PRESUMPTION THAT IMPROPER ACTS OF HUSBAND WILL PRODUCE NATURAL EFFECT UPON WIFE. — Where the voluntary conduct of a husband is inconsistent with marital integrity, it is conclusively presumed

that he intended the natural and ordinary effect thereof upon his wife, and the law will not condone his offense on the ground that his acts were not willfully done to annoy or vex her, and that he did not suppose any publicity would be given to them, or that she would be told about them.

C. W. Pendleton and Thomas J. Carran, for the appellant.

John G. Rossiter, for the respondent.

PATERSON, J. This is an action for divorce on the ground of extreme cruelty. The material allegations of the complaint are as follows: —

“Plaintiff further alleges that on the evening of the eleventh day of March, 1891, the plaintiff and defendant left their home in South Pasadena, in this county, for the purpose of attending a lecture in the city of Los Angeles; that they left their infant child at their said home in the care of their domestic, one Annie Peterson; that after said lecture the plaintiff and her sister went to the house of a friend in the said city of Los Angeles for the purpose of spending the night there; that the defendant returned to their said home and found the said Annie Peterson in bed and asleep; that defendant then and there entered the bed of said Annie Peterson, and attempted to have sexual intercourse with her; that he tried to persuade her that it would not be wrong for him and her to have sexual intercourse together; that he remained in bed with the said Annie Peterson for upwards of two hours before retiring to his own room; that this conduct on the part of defendant has received great publicity by reason of a complaint having been made by the said Annie Peterson before a magistrate in the city and county of Los Angeles, charging the defendant with having at said time and place assaulted her with intent to commit a rape upon her; that afterwards the said defendant came to plaintiff and threatened to turn her out upon the world penniless unless she would help him to keep the said Annie Peterson from prosecuting him on the said complaint; that this conduct on the part of the defendant, and the publicity which has been given to it, has caused plaintiff grievous mental suffering, thereby greatly impairing her health.”

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action; the demurrer was overruled; defendant offered no further defense to the action; the court, upon the proofs taken, found

the facts alleged in the complaint to be true, and judgment was entered in favor of the plaintiff, dissolving the bonds of matrimony. From this judgment the defendant has appealed, and now insists that the demurrer ought to have been sustained, because the facts alleged are insufficient to support a finding of extreme cruelty.

Our statute provides that "extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

Courts and elementary writers have found it impossible to define with precision what acts will constitute extreme cruelty, and it would be idle for us to review the decisions cited, because they are as variant as the language of the several statutes upon which they were founded. The habits and dispositions of different married persons vary so much that it is impossible to lay down any universal rule for the determination of what indignities should be regarded as grounds of divorce under the statute. The legislature has necessarily employed general words, and left each case to be determined according to its own peculiar circumstances, by the good sense and judgment of courts and juries. "Whether, in any given case, there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party": *Barnes v. Barnes*, 95 Cal. 171.

We cannot, as matter of law, say that the conduct charged in the complaint did not inflict upon the plaintiff grievous mental suffering. The court below has found as a fact that it did, and it is the province of that court, and not our own, to determine the facts. The evidence is not in the record, and the finding is conclusive. We presume the court considered the character of the parties, and was guided by the statute and its sense of right and justice, and not by any chivalric sentiment, in awarding a decree to the plaintiff.

The attorneys for appellant attempt to excuse his conduct on the ground that the acts imputed to him were not willfully or deliberately done to annoy or vex the plaintiff, — that he did not suppose any publicity would be given to them, or that his wife would be told about them; but the law will not condone a violation of the marriage obligation on any such ground. His conduct being voluntary, and inconsistent with marital integrity, it is conclusively presumed that he intended the natural

and ordinary effect thereof upon his wife. He, better than any one else, is supposed to know the effect a disclosure of his acts would have upon her; he took the chances of being found out, and must suffer the consequences. His threat to turn his wife out upon the world penniless, unless she assisted in saving him from a prosecution for his offense, did not indicate any contrition on his part, or that his consideration for the feelings of plaintiff would be any greater in the future than it had been in the past.

Judgment affirmed.

IN THE CASE OF *Barnes v. Barnes*, 95 Cal. 171, it was decided that a finding that the defendant, in an action for divorce upon the ground of extreme cruelty, inflicted grievous mental suffering upon the plaintiff, by imputing to him, in the presence of others, the grossest immorality and personal impurity, is a sufficient finding of extreme cruelty to sustain a judgment for the plaintiff, and that it is not necessary to allege or find that the charges complained of had an injurious effect upon the health of the plaintiff. The court in that case held that any unjustifiable conduct upon the part of either of the spouses which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.

MARRIAGE AND DIVORCE. — EXTREME CRUELTY, WHAT CONSTITUTES: See notes to *McVickar v. McVickar*, 19 Am. St. Rep. 433; *Nye's Appeal*, 12 Am. St. Rep. 877; extended note to *Morris v. Morris*, 73 Am. Dec. 619; extended note to *Poor v. Poor*, 29 Am. Dec. 674. Vulgar and profane language is not sufficient ground for granting a wife a divorce, unless there are reasonable grounds to believe her life is endangered: *Davis v. Davis*, 8 Ky. 32. The contrary is held in *Melvin v. Melvin*, 130 Pa. St. 6. When a husband frequently called his wife opprobrious names, and charged her with infidelity, naming various men with whom he charged her with having improper intercourse, a finding of cruel and inhuman treatment is justified: *Waltermire v. Waltermire*, 110 N. Y. 183. There is no statutory authority which authorizes a divorce at the suit of a husband for "such indignities to his person as to render his condition intolerable and life burdensome": *Power's Appeal*, 120 Pa. St. 320.

MARRIAGE AND DIVORCE. — MENTAL ANGUISH AS CRUELTY: See extended note to *Poor v. Poor*, 29 Am. Dec. 677. In the absence of bodily violence by a husband, in order to entitle a wife to a divorce, she must show such cruel treatment as produced a degree of mental anguish which threatens to impair her health: *Eastman v. Eastman*, 75 Tex. 473; *Waldron v. Waldron*, 85 Cal. 251. Abuse which causes mental suffering, and produces ill health, thereby rendering cohabitation physically unsafe, is legal cruelty, and a ground for divorce: *Jones v. Jones*, 62 N. H. 463.

MORE v. CALKINS.

[95 CALIFORNIA, 435.]

TRUST DEED — INSTRUMENT CONVEYING LEGAL TITLE UPON TRUSTS DECLARED IN. — An instrument which conveys to the grantee the legal title to property therein described upon certain trusts, which it declares, and which confers upon him the power, in execution thereof, to sell the property thus conveyed, and transmit the legal title to his grantee, is a trust deed.

CONVEYANCE — WHEN MORTGAGE AND WHEN A DEED OF TRUST. — In determining whether a conveyance is to be treated as a mortgage or as a deed of trust, the fact that it was made directly to a creditor of the grantor, and not to a third party, is immaterial, since that question must depend upon the essential character of the instrument, as shown by its terms, and not upon whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared.

TRUST DEED — DEATH OF GRANTOR NOT REVOCATION OF POWER OF SALE IN. — The death of the grantor does not operate as a revocation of a power of sale contained in a deed of trust, nor limit the effect of the deed, and therefore the failure to present to the administrator of the deceased the claims secured by it furnishes no ground for a court of equity to cancel the deed.

LAW OF CASE, DECISION CONSTRUING DEED IN, WHEN. — Where, upon a former appeal in a case, the supreme court, in construing a deed of trust, decided that a promise to pay to the trustee therein ten thousand dollars, besides his debt and the reasonable expenses of his administration, was without consideration, such construction becomes the law of the case, and the question of its correctness is not open to consideration upon a second appeal.

TRUST DEED. — COMPENSATION FOR SERVICES OF TRUSTEE. — A trustee under a trust deed is entitled, upon the close of his trust, to a reasonable compensation for his services in performing his duties as trustee under the deed, to be fixed by the court, unless the parties can agree in relation thereto, and also to be reimbursed for all expenses incurred by him.

Barclay, Wilson, and Carpenter, L. C. McKeeby, and W. H. Wilde, for the appellant.

Wright and Day, for the respondents.

DE HAVEN, J. The plaintiff is the administrator of the estate of Alexander S. More, deceased, and the prayer of the complaint filed in the action is, that a certain trust deed, executed by the deceased in his lifetime, be declared void, and that defendant Calkins be enjoined from selling the land, water-ditch, and water rights conveyed by said deed under the power which is given therein. The case was here before. The opinion upon the former appeal is reported in 85 Cal. 177, and the deed referred to is there set out in full.

After the decision upon the former appeal, the plaintiff filed a supplemental complaint, in which it is alleged that the defendant did not, within the time limited by section 1493 of the Code of Civil Procedure, present the claims secured by said deed to the plaintiff as administrator of Alexander S. More, deceased, and it is averred that the same are barred by sections 1493, 1500, and 1502 of the Code of Civil Procedure.

It was further alleged in the supplemental complaint that after the commencement of the action, the defendant Calkins made a conveyance to one Merton B. Hull of all the property described in the deed executed by deceased, and that said Hull had notice of the pending action, and the plaintiff asked that Hull be made a party defendant, and for a judgment to the effect that the deed from defendant Calkins to said Hull be canceled, and Hull compelled to convey all of said property to the plaintiff, as administrator of the estate of the deceased Alexander S. More, and that all of the claims mentioned in the deed of trust, executed by deceased to defendant Calkins, be declared barred, and that plaintiff be put in possession of all of the property conveyed by said deed. Hull appeared in the action, and joined with the other defendant in an answer to the supplemental complaint.

The judgment of the superior court was, that the deed executed by Calkins to his co-defendant, Hull, be canceled, and it further directed that the property conveyed to defendant Calkins by the deed of trust executed by deceased be sold, and said judgment also determined the amount which the defendant Calkins, as trustee, is entitled to retain out of the proceeds of such sale, in which amount is included the sum of ten thousand dollars, which is provided for in the deed referred to. The plaintiff appeals from the judgment.

1. The instrument which the plaintiff seeks to have set aside is a trust deed. It conveyed to defendant Calkins the legal title to the property described, upon the trusts which it declares, and conferred upon him the power, in execution thereof, to sell the property thus conveyed, and transmit the legal title to his grantee: *Koch v. Briggs*, 14 Cal. 257; 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480; *Thompson v. McKay*, 41 Cal. 221.

It is not material that in this case the conveyance was made directly to Calkins, who was a creditor, and not to a third party. Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential char-

acter, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. In *Thompson v. McKay*, 41 Cal. 221, the deed was upon a trust to sell or lease the premises conveyed, and after making certain deductions, to apply the proceeds to the payment of a promissory note executed by the grantor in favor of the grantee, and the court said, in declaring the legal effect of this deed: "That the deed from Gowen to Hill conveys the fee, and that Hill had the power, in execution of the trust, to transmit the legal title to a purchaser, is too plain for debate."

2. The death of the grantor did not operate as a revocation of the power of sale contained in the deed under consideration, or in any manner limit the effect of the deed, and this being so, the failure to present to the administrator of deceased the claims secured by it furnishes no ground for a court of equity to cancel the deed: *Whitmore v. San Francisco Savings Union*, 50 Cal. 146.

As the deed made by plaintiff's intestate requires no judicial foreclosure, and the powers and trusts therein declared are in full force, it follows that sections 1493 and 1502 of the Code of Civil Procedure, prescribing the time within which claims must be presented against the estate of a deceased person, and section 1500 of the same code, allowing an action for foreclosure of a mortgage without presentation of such claim only "when all recourse against any other property of the estate is expressly waived in the complaint," have no application to the case before us, and the right of the defendant to execute the powers conferred by the deed, and apply the proceeds arising therefrom to the payment of the debts and charges named in the deed, is not dependent upon a compliance with these sections.

3. The deed provides that out of the proceeds of the sale of the property thereby conveyed, the defendant Calkins shall pay, — "1. The reasonable expenses of the management of said lands and property, and of the execution of these trusts; 2. To the said J. W. Calkins the sum of fifteen thousand dollars, with interest thereon at the rate of ten per cent per annum, together with the additional sum of ten thousand dollars, which the party of the first part hereby agrees to pay the party of the second part, without interest," etc. The court below, in its decree, allowed to the defendant this last-named sum of

ten thousand dollars, without interest, and its action in this respect is assigned as error.

The provision of the deed just quoted was under consideration by this court upon the former appeal, and was construed as follows: "The fact that it appears upon the face of the instrument that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay ten thousand dollars without interest, tends to corroborate the averment that there was no consideration for the promise to pay the ten thousand dollars. But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars without interest."

The construction thus placed upon the deed has become the law of the case, and the question of its correctness is not open to consideration upon this appeal: *Table Mountain T. Co. v. Stranahan*, 21 Cal. 548. And in view of what was thus said by the court on the former appeal, we think the court was not justified in allowing to the defendant Calkins this sum of ten thousand dollars. The court found, in relation to the consideration for this promise to pay this sum, as follows: "That the said trust deed, and every part thereof, was and is supported by a good and valid consideration received by said Alexander S. More in the execution of said trusts, and that the item of ten thousand dollars mentioned in said deed of trust was a part of the entire transaction, and was a *bonus* or consideration, in addition to interest on the money provided to be advanced, for the use and benefit of said Alexander S. More, and as part of the consideration for furnishing of the money in said deed of trust provided, and for the services to be rendered and the obligations assumed, as set forth in said deed of trust." In this the court does not find that the defendant Calkins was to furnish any other money, or assume any other obligations, or render any other services, than appears from the deed itself. But if it be true, as the court held on the former appeal, "that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay the ten thousand dollars," it necessarily follows that unless the promise to pay this ten thousand dollars is founded upon some other consideration than the express agreement of defendant Calkins to furnish the money and assume the other obligations

and duties provided for in the deed of trust, the promise to pay this sum must be held to be without consideration, if the law as declared in the former opinion is to be followed; for it was in view of the fact that the court construed the deed as providing in other parts for the payment of everything which the court below finds that defendant was to furnish in the way of money, and for the rendition of all his services as trustee, that upon the former appeal this court said: "But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars, without interest."

As already stated, we are not, upon this appeal, at liberty to review the former opinion, and place upon the deed under consideration any other construction than was given to it there.

The defendant, upon the close of his trust, is entitled to a reasonable compensation for his services in performing his duties as trustee under the deed, and is entitled to be reimbursed for all expenses incurred by him. The compensation will have to be fixed by the court, unless the parties can agree in relation thereto.

The finding of the court as to the amount which defendant Calkins is entitled to retain out of the proceeds of the sale of the property conveyed by the trust deed is not questioned, except as to the item of the ten thousand dollars, already discussed, — that is, his right to retain all the money found due him, except this ten thousand dollars, is not denied, unless he lost his right to retain the same by a failure to present his claim therefor to the executor of the deceased. Nor is there any other objection made to the judgment itself. Under these circumstances, it is not necessary that there should be any new trial of the action.

Judgment reversed and cause remanded, with directions to the superior court to modify its judgment in accordance with this opinion, by striking therefrom the allowance to defendant Calkins of the said sum of ten thousand dollars, and providing in place thereof that he be allowed a reasonable compensation, upon the settlement of the trust, to be fixed by the court.

TRUST DEEDS, WHAT ARE — DISTINGUISHED FROM MORTGAGES. — A deed conveying absolute title to trustees on a declared trust will not be construed as a mortgage, and there will be no equity of redemption from a sale thereunder: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 323. An instrument made

to secure an indebtedness, and providing that a trustee shall sell the property mentioned in the instrument, and from the proceeds pay the debt, is a trust deed, and not a mortgage: *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651, and note. A deed of trust is a conveyance to a trustee for the purpose of raising funds to pay debts, and a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. See *Chowning v. Cox*, 1 Rand. 306, 10 Am. Dec. 530, as to the distinction between a trust deed and a mortgage. Where a testator devised his entire estate to trustees for the benefit of his children, naming them, or their heirs, a valid trust deed was created: *O'Rourke v. Baird*, 151 Mass. 9.

TRUST DEEDS — POWER OF SALE IN, is not revoked by the death of the grantor: See note to *Tyler v. Herring*, 19 Am. St. Rep. 276.

LAW OF CASE. — When a ruling is made in a case by the appellate court, it becomes the law of that case, and cannot be reviewed at a subsequent term: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note. A decision of the supreme court on a former appeal as to a certain question involved becomes the law of the case, and will be followed on a second appeal: *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; see note to *Gould v. Sternburg*, 15 Am. St. Rep. 142.

TRUSTS — ALLOWANCE OF COMPENSATION TO TRUSTEES. — When a trustee is appointed in partition proceedings, and he sells the land, and the proceeds are paid into court, the court may adjudicate the trustee's account, and make an allowance to him for his services in conducting the sale: *Wistar's Appeal*, 125 Pa. St. 526; 11 Am. St. Rep. 917. Commissions are allowed trustees in making sales, both by law and the rules of the court: *Gibson's Case*, 1 Bland, 138; 17 Am. Dec. 257, and extended note; see *Cook v. Gilmore*, 133 Ill. 139. To allow or refuse commissions to fiduciaries is directed to the sound discretion of the court: *Whitehead v. Whitehead*, 85 Va. 870. A trustee takes no commissions, where the deed expressly provides for the payment of the expenses of the trust, but is silent as to his compensation, where he takes the trust coupled with an interest: *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 116, and note.

[IN BANK.]

BATES v. BABCOCK.

[95 CALIFORNIA, 479.]

DEMURRER OF DEFENDANT OVERRULED FOR WANT OF PRESENTATION, HOW FAR CONSIDERED ON APPEAL. — When a defendant's demurrer to the plaintiff's complaint is overruled for want of presentation, the plaintiff having appealed from a judgment in favor of the defendant, the latter cannot urge any grounds of special demurrer, or any errors committed against him, for the purpose of sustaining the judgment erroneously rendered in his favor after a trial on the merits. In such case the supreme court can consider only such errors as contributed to the rendition of the judgment for the defendant, and can consider the demurrer only so far as it challenges the cause of action and affects the question whether the complaint is sufficient to render the exclusion of evidence under it erroneous.

PLEADING — AVERMENT OF COMPLAINT, HOW CONSTRUED. — The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint.

PARTNERSHIP IN LANDS — ALLEGATIONS AS TO, IN COMPLAINT. — An allegation in a complaint that the defendants agreed, upon certain terms, to become equal partners with the plaintiff in certain lands, shown by other allegations of the complaint to have been held by the plaintiff upon a dry, naked trust for third parties, and to have been purchased from the beneficiaries and transferred to another person as trustee for plaintiff and defendants, does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with other averments of the complaint, that they were to share equally all sums received for the property, and all profits and losses accruing on account thereof, shows that the agreement was for a partnership in the profits that might result from dealing in the lands, and had no necessary relation to the ownership of the land.

PARTNERSHIP FOR DEALING IN LANDS MAY BE FORMED WITHOUT WRITING.

— A partnership may be formed for the purpose of dealing in lands by buying and selling lands generally, or it may be limited to a speculation upon a single venture, being, like any other contract of partnership, an agreement to share in the profit and loss of certain business transactions, and need not be in writing, under the statute of frauds, but may be formed by oral agreement, and its existence established by parol evidence.

PARTNERSHIP FOR DEALING IN LANDS — EQUITABLE RIGHTS OF PARTNERS IN.

— Although an agreement of partnership for dealing in lands does not create any interest or estate in lands, and a bill for the conveyance of lands cannot be maintained under it, yet by the subsequent acts of the parties rights are acquired in reference to the lands purchased in pursuance of the agreement which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud, by raising an equity superior to the legal title and controlling that title in subordination to this superior equity.

PARTNERSHIP IN LANDS, ASSETS OF, WHEN TREATED AS PERSONALTY IN EQUITY. —

Lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement, and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets. When the existence of such a partnership is proved, the rights and obligations of the respective partners are to be determined upon the same principles and with the same results as in other partnerships.

PARTNERSHIP — SOURCE OF TITLE TO ASSETS NOT INQUIRED INTO IN SETTLING ACCOUNTS. — A court of equity, in settling partnership accounts and converting the partnership assets, real or personal, into money, and dividing them among the partners, never inquires into the source of the title to such assets, or in whose name they are held.

STATUTE OF FRAUDS NO DEFENSE TO ACTION FOR DIVISION OF PROCEEDS OF SALE OF LANDS BY PARTNERSHIP. — In an action for a division of the proceeds of a sale of lands made under an oral partnership agreement for dealing in lands, the statute of frauds is no defense, and the same principles that apply to such an action are applicable in an action to

subject lands which have become a portion of the assets of such a partnership to a sale and distribution of the proceeds among the partners, under the direction of a court of equity.

STATUTE OF FRAUDS ARE NOT APPLICABLE TO AN EXECUTED AGREEMENT.

PARTNERSHIP — TRUST RESULTING BY OPERATION OF LAW IN LANDS ACQUIRED BY. — If, upon sufficient evidence, a partnership between parties for dealing in lands is proved, they will have an interest in the land which forms a portion of the assets of the partnership, resulting by operation of law as an incident to such partnership, but that fact will not constitute a reason for excluding parol evidence to establish the existence of the partnership.

Sprigg and Barber, for the appellant.

Works, Gibson, and Titus, and Works and Works, for the respondents.

HARRISON, J. The plaintiff brought this action against the defendants for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate in San Diego. At the trial of the action, the plaintiff offered himself as a witness, and under the objection of the defendants that it was incompetent and immaterial, gave testimony tending to show that an oral agreement had been made between himself and the defendant Babcock, acting on behalf of the defendant the Coronado Beach Company, of which he was president, by which they were to pay off the encumbrances upon certain real estate, sell and dispose of the same, and share the profits and loss in dealing therein; that for that purpose he gave to the defendants fifteen thousand dollars with which to pay certain claims and encumbrances thereon, and that the same was so applied; and that at the request of the defendant Babcock, a conveyance of the property was executed to one Hubbell, who was the secretary of the defendant corporation. After this testimony had been given, the defendants moved to strike out all portions thereof "relating to an agreement for an alleged partnership between the plaintiff and the defendants, or either of them, in the land described in the complaint, or any partnership between the parties, upon the ground that the same is incompetent and immaterial; that a partnership of the character alleged in the complaint must be proved by an instrument in writing, signed by them, or one of them." The court granted the motion, saying that "the contract, as alleged in the complaint and supported by the evidence, is one clearly for an interest in lands, and, as such, is void under the statute of frauds." Upon the submis-

sion of the cause, the court, in its decision, found that there had been no agreement for a partnership in the land, and rendered judgment in favor of the defendants. From this judgment, and an order denying his motion for a new trial, the plaintiff has appealed.

We cannot, upon this appeal, consider the objections to the complaint that were made by the demurrer thereto, except the one specifying that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled for "want of presentation," and the defendants, having gone to trial upon their answer, obtained a judgment in their favor upon the merits. Upon an appeal by the plaintiff from that judgment, we can consider only such errors of the court as are shown to have contributed to its rendition, and not such as might have defeated a contrary judgment. If a judgment in favor of the defendant is the result of errors in excluding evidence that should have been received, he, as respondent upon an appeal, cannot, for the purpose of sustaining that judgment, have a consideration of errors against him which were entirely disconnected with the trial, or the judgment as rendered. Objections to a complaint which should be pointed out by special demurrer, such as uncertainty or ambiguity, are insufficient, unless so specified, to defeat a verdict against the defendant; nor can they, if specified and overruled, be considered for the purpose of sustaining a judgment in his favor that was erroneously rendered after a trial upon the merits. It is only when there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof, and if sufficient to sustain the averments, to render a judgment as asked by the plaintiff.

The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. The averment that the defendants agreed with the plaintiff that if

he would pay certain claims against the property "they would become equal partners with him in the said property" does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with the averment immediately following, viz., "and would share equally with him, in the proportion of one half to plaintiff and one half to defendants, all sums received for said property, and all profits and losses accruing on account thereof," which is evidently inserted by way of explanation, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land.

It appears from the complaint that at the time of this agreement the property in question was owned by one Miller and his wife, and that the defendant corporation held certain mortgages thereon, which were subordinate to certain other liens, and that the title to the property stood in the name of the plaintiff, and was held by him "as trustee for the benefit of said Miller and wife." It does not appear that the plaintiff had any beneficiary interest in the land, and the averment that five thousand dollars of the money advanced by him under the agreement was paid to the Millers "for a release from the said trust in their favor" confirms the inference that it was merely a dry, naked trust. The subsequent averment that "in pursuance of said agreement," then made, the plaintiff paid to the defendants fifteen thousand dollars with which to remove certain charges and encumbrances, and that "all of said property was duly transferred by plaintiff to O. S. Hubbell, Esq., secretary of said Coronado Beach Company, as trustee for the parties hereto, to facilitate a sale," and that with the concurrence of the defendants the plaintiff paid liens and debts on account of said property amounting to forty-two thousand dollars, removes all possibility of construction that the agreement was for a sale of the property to the defendants, or for the creation of an interest or estate therein, and shows that the parties dealt with the property as assets of their said partnership.

A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional, or commercial, or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying

and selling land generally, or it may be limited to a speculation upon a single venture: *Dudley v. Littlefield*, 21 Me. 422; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Williams v. Gillies*, 75 N. Y. 201.

Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a *dictum* in *Gray v. Palmer*, 9 Cal. 639, to the effect that it must be in writing, for which Story on Partnership, section 83, is cited as authority; and in *Smith v. Burnham*, 3 Sum. 458, it was so held by that distinguished jurist. The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence. It was so stated in *Coward v. Clanton*, 79 Cal. 28, where it was held that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels, and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing. More than a hundred years ago it was held by Lord Thurlow, in *Elliot v. Brown*, reported in 3 Swanst. 489, 1 Vern. 217, that the right of survivorship in a joint demise of a farm was destroyed by reason of the tenants having farmed the land upon joint account, and thus by their acts made it partnership assets. The question was very fully considered by Vice-Chancellor Wigram in *Dale v. Hamilton*, 5 Hare, 369, wherein previous decisions involving similar principles were reviewed, and it was held that under the principles of those decisions the existence of such a partnership could be shown by general evidence, without the necessity of a written agreement. In that case a parol agreement had been entered into, under which a tract of land was to be purchased in the name of one McAdam, and laid out in lots, and resold, he furnishing the capital and the plaintiff the skill and labor necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdam, but the defendants, who had succeeded to McAdam, with notice of the agreement, afterwards refused to carry it out. Thereupon the plaintiff filed his bill for an accounting and a sale of the land under the direction of the court, with a division of the proceeds in ac-

cordance with the terms of the agreement. The defendants resisted the suit, upon the ground that the agreement was within the statute of frauds, and could be established only by an instrument in writing; but the vice-chancellor overruled their objections and upheld the bill. In his opinion (p. 383) he uses the following illustration in support of his conclusion, which is peculiarly appropriate to the present case: "In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value, that a loss had been sustained, and that Hamilton and McAdam were the plaintiffs, seeking to compel Dale to contribute his proportion of the loss. If in this case the authorities would have enabled Hamilton and McAdam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will, upon like proof, support the present suit upon the principle—that of mutuality in remedies—which enables a vendor to recover the purchase-money in this court, though the remedy at law may be equally adequate and more appropriate," and cites several authorities to the effect that in such a case the defendant would have been liable for contribution. The rule laid down in *Dale v. Hamilton*, 5 Hare, 369, has since been generally followed, and although there are some decisions to the contrary, may now be said to be the prevailing rule upon that subject.

Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the statute of frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense, the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement,—that sense in which the beneficiary, under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest, resulting from the sale and a right to have the land sold, rather than an interest in the land itself. The statute of frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement

rights are acquired in reference to the land that may be purchased in pursuance of the agreement which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but by reason of the acts of the parties thereunder an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity.

It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships.

The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. The question has frequently arisen in actions for the division of the proceeds after a sale under such an agreement, and it has been invariably held that the statute of frauds is no defense thereto: *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *Benjamin v. Zell*, 100 Pa. St. 33; *Trowbridge v. Wetherbee*, 11 Allen, 861; *Babcock v. Read*, 99 N. Y. 609; *Coward v. Clanton*, 79 Cal. 23; Reed on Statute of Frauds, sec. 727. See also *Byers v. Locke*, 93 Cal. 493; 27 Am. St. Rep. 212. Under such an agreement, it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas if the agreement was invalid at the outset, it could not form the basis of such an action. If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its

enforcement for the purpose of carrying out its original purpose,—the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners. This was the case presented and maintained in *Dale v. Hamilton*, 5 Hare, 369. The same procedure was upheld in *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Bunnel v. Taintor*, 4 Conn. 568; *Hunter v. Whitehead*, 42 Mo. 524; *Bissell v. Harrington*, 18 Hun, 81; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Coward v. Clanton*, 79 Cal. 23. After the agreement for the purchase and sale has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the statute of frauds: *Pico v. Cuyas*, 47 Cal. 174. The statute of frauds has no application to an executed agreement.

That the agreement between the parties which is averred in the complaint, and the evidence given in support thereof, did not contemplate any transfer of the land, or of any interest therein, to the defendants, or either of them, but had for its object only a division of the profits and loss that would remain after its sale, is shown by a consideration of the averments of the complaint hereinbefore presented, and also by the direction of Babcock to the plaintiff while negotiating the agreement, to "sell it off as soon as you can, pay up the debts, and divide the profits." It was not necessary for the plaintiff, in support of these averments, to produce written evidence of the agreement, but the agreement could have been established by his oral testimony; and the court erred in striking out the testimony that he gave in support of the agreement. The first question to be determined by the court was, whether there was a partnership, and that fact could be shown by general evidence. In *Forster v. Hale*, 5 Ves. 309, where the right to an interest in the leasehold of a colliery, claimed by virtue of a partnership with one of the lessees, was involved, and it was objected that by permitting parol evidence to establish such interest, an interest in real estate or a declaration of trust would be gained without any writing, in violation of the statute of frauds, Lord Loughborough said: "That is not the question: it is, whether there was a partnership; the subject being an agreement for land, the question is, whether there

was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." Under the same principles, if, in the present case, the court should find, upon sufficient evidence, that a partnership existed between the parties, the fact that they would have an interest in the land which forms a portion of the assets of the partnership would result by operation of law as an incident to such partnership, but this result would not constitute a reason for excluding parol testimony to establish the existence of the partnership.

For the error of the court in striking out the evidence of the plaintiff, the order and judgment are reversed, and the court is directed to grant a new trial.

BEATTY, C. J. (dissenting). I dissent. The complaint, in my opinion, shows no cause of action, and the evidence offered and stricken out by the court was of a parol contract, invalid under the statute of frauds.

PARTNERSHIP TO DEAL IN REALTY. — EVIDENCE TO ESTABLISH: See extended note to *Pags v. Thomas*, 54 Am. Rep. 792-800. As to whether lands may become partnership property without any writing, see extended note to *McCormick's Appeal*, 98 Am. Dec. 197-201, and to *Greene v. Greene*, 13 Am. Dec. 646-648. See also *Alkire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540.

PARTNERSHIP REAL ESTATE is, in equity and for partnership purposes, to be treated as personalty: *Rovelsky v. Brown*, 92 Ala. 522; 25 Am. St. Rep. 83; *Summey v. Patton*, Winst. Eq. 52; 86 Am. Dec. 451, and note.

PARTNERSHIP — LAND, WHEN REGARDED AS FIRM ASSETS. — As between partners, land treated by them as partnership property, especially if purchased and paid for with partnership money, is regarded as firm assets: *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899, and note; note to *Goodman v. Gay*, 53 Am. Dec. 599.

MORGAN v. SOUTHERN PACIFIC COMPANY.

[95 CALIFORNIA, 510.]

EXCESSIVE DAMAGES, AWARDING OF, GROUND FOR REVERSAL, WHEN. — When the amount of damages awarded in an action for negligence is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive. A verdict of twenty thousand dollars, in an action by a mother for the death of her daughter, two years old, alleged to have been caused by the negligence of the defendant, will be set aside as excessive, especially where the complaint alleges no special damage, and no evidence whatever is introduced or offered upon the subject of damage.

DAMAGES FOR DEATH OF RELATIVE LIMITED TO ACTUAL PECUNIARY INJURY SUSTAINED. — In an action to recover damages for the death of a relative, caused by negligence, the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; sorrow and mental anguish caused by the death are not elements of damage, and nothing can be recovered as a *solatium* for wounded feelings; and loss of society can only be considered for the purpose of estimating the pecuniary loss. It is therefore error, in an action by a mother to recover damages for the death of her minor daughter, to charge the jury that it is not limited by the actual pecuniary injury sustained by the plaintiff by reason of the death of her child.

DEATH OF MINOR CHILD, DAMAGES RECOVERABLE FOR. — In an action by a parent for the death of a minor child, the main element of damage is the probable value of the services of the deceased until he attains his majority, considering the cost of his support and maintenance during the early and helpless part of his life.

LOSS OF SERVICE OF DECEASED CHILD NEED NOT BE ALLEGED IN COMPLAINT IN ACTION FOR HIS DEATH. — In an action by a parent for the death of his minor child, the complaint need not specially allege the loss of the services of the deceased. Such loss is not special damage, necessary to be averred, but is a natural and necessary sequence of the death.

E. L. Craig, Foshay Walker, Horace Hawes, and R. B. Carpenter, for the appellant.

Charles G. Lamberson, J. W. Ahern, and Lamberson and Taylor, for the respondent.

McFARLAND, J. The parties to this action are the same as in *Morgan v. Southern Pacific Co.*, 95 Cal. 501, this day decided, in which plaintiff recovered a judgment for fifteen thousand dollars for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years; nine days afterwards the child died from an

attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of twenty thousand dollars, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial.

The evidence upon the issues of the alleged negligence of defendant's employees at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case; and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars"; and there was no evidence whatever introduced or offered upon the subject of damage. The jury therefore had nothing before them upon which to base damages, except the naked fact of the death of a female child two years old; and it is apparent at first blush that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account

of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a *solatium* for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: *Pennsylvania R. R. Co. v. Vandever*, 36 Pa. St. 298; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; *St. Louis etc. R'y Co. v. Freeman*, 36 Ark. 41; *Atchison etc. R. R. Co. v. Brown*, 26 Kan. 443; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356; *Kansas Pac. R'y Co. v. Miller*, 2 Col. 466; *Kesler v. Smith*, 66 N. C. 154; *March v. Walker*, 48 Tex. 872; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *James v. Christy*, 18 Mo. 162; *Hyatt v. Adams*, 16 Mich. 180; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; *Blake v. Midland R. R. Co.*, 18 Q. B. 93.

With respect to the decisions in this state, we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was, whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; . . . but in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured, or at least considered, from a pecuniary stand-point. . . . If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the

purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case, where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." The Beeson case, therefore, does not decide that the jury may depart from a pecuniary stand-point in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband, they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated.

Cook v. Clay Street Hill R. R. Co., 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson case.

In *McKeever v. Market Street R. R. Co.*, 59 Cal. 294, the point was not involved; and in *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 320, the point does not appear in any way to have been involved, and the *dictum* at the close of the opinion, as it refers to the Beeson case, must be held as only intended to go to the length of the latter case.

It is true, however, that in *Cleary v. City R. R. Co.*, 76 Cal. 240, a decision in Department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in Bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents"; but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson case. But entirely contrary views were expressed in the latest decision of this court on the subject: *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248. In that case, — which was for the death of an adult son, — the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his mother"; and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive

verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words 'sorrow, grief, and mental suffering occasioned by the death of his son to his mother.' In thus directing the jury the court fell into an error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased. . . . We have found no case in which damages for sorrow, grief, and mental suffering are allowed under any of the statutes." And further, that the statutory action is a new one, "and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury." The case was decided in Bank. Justice Thornton delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must therefore have concurred in the one main reason for which the judgment was reversed; he may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly; although as to one matter it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, as hereinbefore stated, — that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest.

We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred.

There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant; and plaintiff is not appealing.

The judgment and order appealed from are reversed, and a new trial ordered.

DE HAVEN, J. (concurring). I concur in the judgment. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of Shearman and Redfield on Negligence, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like."

The sixth instruction, given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of section 377 of the Code of Civil Procedure, that in actions of this character, "such damages may be given as under all the circumstances of the case may be just," is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating as they do to the loss of future service, and necessarily based upon probabilities, and upon *data* which in many respects are uncertain, and therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is, that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

Hearing in Bank denied.

DAMAGES — EXCESSIVE, AS GROUND FOR REVERSAL OF JUDGMENT. — The supreme court will set aside a verdict as excessive when satisfied that the evidence does not support the assessment of damages: *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781. The amount of damages recoverable in actions for personal torts must be left to the discretion of the jury, and a new trial will not be granted on the ground that they are excessive, unless the verdict impresses the court with the conviction that it resulted from passion or prejudice: *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883, and note; *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; note to *Central R. R. Co. v. Smith*, 2 Am. St. Rep. 40; see *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and note; *Florida Railway etc. Co. v. Webster*, 25 Fla. 394; *O'Connell v. St. Louis etc. R'y Co.*, 106 Mo. 482.

DAMAGES — WHAT ALLOWABLE. — Exemplary damages, when allowable, should be proportioned to the actual damages sustained: *International etc. R. R. Co. v. Telephone etc. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45, and note. Where the death of one person is caused by the wrongful act or omission of another, the damages are purely compensatory for pecuniary loss: *Hutchins v. St. Paul etc. R'y Co.*, 44 Minn. 5; *Vicksburg v. McLean*, 67 Miss. 5; *Tuteur v. Chicago etc. R'y Co.*, 77 Wis. 505. The physical suffering of the deceased, who came to his death through the negligence of the railroad company, preceding his death, can form no basis for damages: *Texas etc. R'y Co. v. Lester*, 75 Tex. 56; see note to *Western U. Tel. Co. v. Rogers*, 24 Am. St. Rep. 308. Damages for mental suffering in actions for negligence resulting in death are discussed in an extended note to *West v. Western U. Tel. Co.*, 7 Am. St. Rep. 525.

BLANC v. PAYMASTER MINING COMPANY.

[95 CALIFORNIA, 524.]

CREDITOR'S SUIT — FRAUDULENT GRANTOR PROPER BUT NOT NECESSARY PARTY. — A fraudulent grantor, though a proper, is not a necessary party defendant in an action to subject to the lien of the plaintiff's judgment property alleged to have been fraudulently conveyed.

PRACTICE — FINDINGS IMPLIED, AND MAY BE EXCEPTED TO, WHEN. — Where findings are waived, and no express findings are therefore found in the record, such findings on all matters of fact in issue as are necessary to support the judgment of the court in favor of the successful party are implied, and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding.

JUDGMENT AGAINST FOREIGN CORPORATION ENFORCEABLE ONLY AGAINST PROPERTY ATTACHED WHEN. — Where a foreign corporation has no managing agent or other officer in a state upon whom service of summons can be made, the only valid judgment that can be rendered against it in an action of *assumpsit* is one in the nature of a judgment *in rem*, against such property as was seized under a writ of attachment therein. The fact that a judgment rendered in such action is a general one for the recovery of money only, and makes no reference to the fact that any

property has been attached therein, does not render it void, if in fact such attachment was made; but if no property was attached in the action, the court is without jurisdiction to render any judgment that can be enforced against the property of the defendant.

RETURN UPON ATTACHMENT NOT CONCLUSIVE OF VALIDITY OF ATTACHMENT WHEN. — The return upon a writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant.

SUMMONS — SERVICE OF, UPON FOREIGN CORPORATION CANNOT BE MADE UPON CLERK IN ITS STORE. — A person employed by a foreign mining corporation in the capacity of a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the California Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in the mine from *data* furnished him by the superintendent, and to pay them. The word "cashier," in that section, refers to an executive officer of a corporation, — as the cashier of a bank, — and not to a simple employee, who is not a managing agent.

FRAUDULENT CONVEYANCE — RECOVERY OF JUDGMENT BY CREDITOR NOT NECESSARY TO ENABLE HIM TO ATTACK, WHEN. — Although, as a general rule, a creditor must have first recovered judgment against his debtor, and have execution returned unsatisfied, before he can resort to an equitable action to reach property fraudulently transferred by his debtor, yet this rule does not apply to a case of a transfer of all the property of an insolvent corporation, without consideration, to a new corporation through the fraud of the managing agent of the insolvent corporation, as part of a scheme to cheat and defraud the creditors and other stockholders of such insolvent corporation. In such a case, the new corporation will be regarded by a court of equity as a continuation of the old one, and be held liable for its indebtedness to the extent of the value of the property that it received from it without consideration, although there has been no valid judgment against the old corporation for the amount of the claim.

Harris and Gregg, for the appellant.

Hunsaker, Britt, and Goodrich, and J. E. Wadham, for the respondent.

DE HAVEN, J. The complaint in this action alleges, in substance, among other matters, that the Esperanza Company, a foreign corporation doing business in Arizona, became, in February, 1884, indebted to plaintiff upon two promissory notes, one for the sum of one thousand dollars payable on demand, and the other for the sum of five thousand dollars payable February 12, 1885; that thereafter the said Esperanza Company became indebted to its various stockholders, and a pretended assignment was made of all its property to its "acting managing officer and agent," one Blaisdell, for the alleged purpose of paying the debts of such corporation, and the said

Blaisdell made a pretended sale of such property at public auction, at which sale "he claims to have become the purchaser of the tools, machinery, stamp-mills, engines, and boilers belonging to the said Esperanza Company, all of the value of seventy-five thousand dollars, at a purely nominal sum, to wit, the sum of fifty dollars"; and thereupon said Blaisdell, "together with the principal officers, agents, and stockholders of the said Esperanza Company, proceeded to organize the defendant," and turned over to it all of the said property, for the purpose of cheating and defrauding plaintiff and other creditors of the Esperanza Company; and in this connection, the complaint further charges "that the said the Paymaster Mining Company, defendant, was so organized by the said Blaisdell, the officers and agents and stockholders of the said Esperanza Company, with the view of taking and receiving said property as a part of said plan for defrauding the creditors of the Esperanza Company, and particularly the plaintiff," and that said defendant never paid any consideration whatever for said property. It is also alleged that the Esperanza Company having failed and refused "to pay the just demands of this plaintiff," he instituted a suit against said company in one of the superior courts of this state "for the collection of the said sum of six thousand dollars," and interest, and a writ of attachment was issued therein, and the property before referred to was attached, etc., and judgment was duly given in his favor, and against said Esperanza Company, for the sum of \$7,784.74 and costs, and that nothing whatever has been paid on said judgment. The prayer of the complaint is, "that the pretended sales of the said Blaisdell to the defendant be declared void," and "that it be adjudged that the said defendant holds the said property charged with the payment of the plaintiff's claim of \$7,784.74, with interest and costs," and that the same be sold to satisfy the same, and for general relief. To this complaint the defendant interposed a demurrer, upon the general ground of insufficiency of the alleged facts to constitute a cause of action, and upon the further ground that there is a defect of parties defendant, because of the failure to make the Esperanza Company and Blaisdell defendants. The demurrer was overruled. Upon the trial, findings were waived, and a judgment rendered in favor of plaintiff in accordance with the prayer of the complaint. The defendant appeals.

It is argued by the appellant here that the court erred in

property has been attached therein, does not render it void, if in fact such attachment was made; but if no property was attached in the action, the court is without jurisdiction to render any judgment that can be enforced against the property of the defendant.

RETURN UPON ATTACHMENT NOT CONCLUSIVE OF VALIDITY OF ATTACHMENT WHEN. — The return upon a writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant.

SUMMONS — SERVICE OF, UPON FOREIGN CORPORATION CANNOT BE MADE UPON CLERK IN ITS STORE. — A person employed by a foreign mining corporation in the capacity of a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the California Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in the mine from *data* furnished him by the superintendent, and to pay them. The word "cashier," in that section, refers to an executive officer of a corporation, — as the cashier of a bank, — and not to a simple employee, who is not a managing agent.

FRAUDULENT CONVEYANCE — RECOVERY OF JUDGMENT BY CREDITOR NOT NECESSARY TO ENABLE HIM TO ATTACK, WHEN. — Although, as a general rule, a creditor must have first recovered judgment against his debtor, and have execution returned unsatisfied, before he can resort to an equitable action to reach property fraudulently transferred by his debtor, yet this rule does not apply to a case of a transfer of all the property of an insolvent corporation, without consideration, to a new corporation through the fraud of the managing agent of the insolvent corporation, as part of a scheme to cheat and defraud the creditors and other stockholders of such insolvent corporation. In such a case, the new corporation will be regarded by a court of equity as a continuation of the old one, and be held liable for its indebtedness to the extent of the value of the property that it received from it without consideration, although there has been no valid judgment against the old corporation for the amount of the claim.

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Blaisdell made a pretended sale of such property at public auction, at which sale "he claims to have become the purchaser of the tools, machinery, stamp-mills, engines, and boilers belonging to the said Esperanza Company, all of the value of seventy-five thousand dollars, at a purely nominal sum, to wit, the sum of fifty dollars"; and thereupon said Blaisdell, "together with the principal officers, agents, and stockholders of the said Esperanza Company, proceeded to organize the defendant," and turned over to it all of the said property, for the purpose of cheating and defrauding plaintiff and other creditors of the Esperanza Company; and in this connection, the complaint further charges "that the said the Paymaster Mining Company, defendant, was so organized by the said Blaisdell, the officers and agents and stockholders of the said Esperanza Company, with the view of taking and receiving said property as a part of said plan for defrauding the creditors of the Esperanza Company, and particularly the plaintiff," and that said defendant never paid any consideration whatever for said property. It is also alleged that the Esperanza Company having failed and refused "to pay the just demands of this plaintiff," he instituted a suit against said company in one of the superior courts of this state "for the collection of the said sum of six thousand dollars," and interest, and a writ of attachment was issued therein, and the property before referred to was attached, etc., and judgment was duly given in his favor, and against said Esperanza Company, for the sum of \$7,784.74 and costs, and that nothing whatever has been paid on said judgment. The prayer of the complaint is, "that the pretended sales of the said Blaisdell to the defendant be declared void," and "that it be adjudged that the said defendant holds the said property charged with the payment of the plaintiff's claim of \$7,784.74, with interest and costs," and that the same be sold to satisfy the same, and for general relief. To this complaint the defendant interposed a demurrer, upon the general ground of insufficiency of the alleged facts to constitute a cause of action, and upon the further ground that there is a defect of parties defendant, because of the failure to make the Esperanza Company and Blaisdell defendants. The demurrer was overruled. Upon the trial, findings were waived, and a judgment rendered in favor of plaintiff in accordance with the prayer of the complaint. The defendant appeals.

It is argued by the appellant here that the court erred in

its ruling upon the demurrer to the complaint; and also that certain implied findings are not justified by the evidence.

1. The demurrer to the complaint was properly overruled. The complaint states a cause of action, and the Esperanza Company and Blaisdell were not necessary parties to the action. Upon the facts alleged in the complaint, neither of them has any interest, either legal or equitable, in the property, and neither could be prejudiced by the judgment which the plaintiff seeks to obtain; and the omission to make them defendants did not in any manner preclude the defendant from interposing any defense which it may have had to the matters alleged in the complaint, and therefore it cannot complain that they were not made parties defendant: *Fox v. Moyer*, 54 N. Y. 130; *Potter v. Phillips*, 44 Iowa, 353; *Coffey v. Norwood*, 81 Ala. 512.

In *Potter v. Phillips*, 44 Iowa, 353, the court, in answer to the objection that the fraudulent grantor was not made a party defendant in an action to subject to the lien of plaintiff's judgment the property alleged to have been fraudulently conveyed, say: "Whilst a proper party, we do not see wherein he can be regarded as a necessary party. Whether the conveyances were fraudulent or in good faith, the property has irrevocably passed beyond his control. In no way can he be prejudiced, in a legal sense, by a determination which subjects the property to the payment of his debts."

And in *Coffey v. Norwood*, 81 Ala. 512, the supreme court of Alabama reach the same conclusion, saying: "Neither the debtor if living, nor if he be dead his personal representatives, can enjoy any of the fruits of a successful prosecution of the suit to set aside the fraudulent conveyance; for after the complaining creditor's demand is satisfied, the remainder of the fund goes to the fraudulent grantee. The debtor, therefore, has no interest, legal or beneficial, either in the property sought to be subjected or in the litigation having reference to it, except remotely or indirectly. Nor can the grantee be prejudiced in any manner by omitting to join the grantor or his personal representative, as he can make any defense to the complainant's demand which the grantor or personal representative could do if he were a party to the suit."

2. The appellant contends that the evidence does not justify the implied finding of the court, that in the action of the plaintiff against the Esperanza Company mentioned in the complaint, an attachment was levied upon the property sought to

be reached by this action, and that the evidence is also insufficient to justify the further implied finding, that in the action referred to a judgment was rendered in favor of this plaintiff, and against the Esperanza Company, for the sum of \$7,784.74.

It is claimed by respondent that inasmuch as findings were waived, and none are to be found in the record, there are no findings to which exception can be taken, and nothing to which appellant's specifications of insufficiency of evidence can relate. We do not think this is a correct view of the law upon this point. There are no express findings in the record, but it is the presumption of law that the court found all the matters of fact in issue, and necessary to support its judgment in favor of the successful party. Such findings are implied, and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. The action of the appellant in thus excepting to the implied findings was proper.

3. The Esperanza Company is a foreign corporation, and had no managing agent or other officer in this state upon whom service of summons was or might have been made in the action which plaintiff brought against it to recover the amount due upon the notes referred to in the complaint. This being so, the only valid judgment which could have been rendered in that action was one in the nature of a judgment *in rem*, against such property as may have been seized under the writ of attachment therein: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Pennoyer v. Neff*, 95 U. S. 714; *Cooper v. Reynolds*, 10 Wall. 308. The judgment rendered in that action was a general one, for the recovery of money only, and made no reference to the fact that any property had been attached therein; but it was not for this reason void, if in fact such attachment was made. In such case the judgment would be held to have the effect of perpetuating the attachment lien, and would be regarded as "so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and considered for that purpose and to that extent is not void": *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Cooper v. Reynolds*, 10 Wall. 308. It follows necessarily, from this view of the law, that in considering whether the court below was justified in finding that plaintiff recovered against the Esperanza Company the judgment alleged in the complaint, it must be first determined whether the evidence is sufficient to sustain

its other implied finding, that the property in controversy here was attached in that action. If such property was not attached, then, under the law as above stated, the court was without jurisdiction to pronounce any judgment in that action which can be enforced against such property. It is shown that the writ of attachment was issued in the action referred to, and it further appears, from the return of the officer in whose hands it was placed for service, that he attached all property "in the possession and under the control of the Paymaster Mining Company, by delivering to and leaving with Cyrus Wheeler, the acting managing agent of said Paymaster Mining Company, personally," a copy of said attachment, etc.

This return is not conclusive in this action. The Paymaster Mining Company was in possession of the property involved in this action, and assuming that it was not capable of being taken into manual possession, then, under subdivision 5 of section 542 of the Code of Civil Procedure, in order to effect its attachment, it was necessary to serve a copy of the writ of attachment, and a notice that the property was attached in pursuance thereof, upon the president or other head of that corporation, or its secretary cashier, or other managing agent thereof: *Kennedy v. Hibernia S. & L. Soc.*, 38 Cal. 151. It is not claimed that Wheeler, upon whom the writ of attachment was served in plaintiff's action against the Esperanza Company, was the president or secretary of the Paymaster Mining Company, and the evidence does not show that he was a managing agent thereof. On the contrary, it appears that he was only employed by that corporation in the capacity of a clerk in a store belonging to it, and although he had the custody of money belonging to the corporation, and it was a part of his duty to keep the accounts of the men employed in the mine from data furnished him by the superintendent, and to pay them, this did not constitute him the "cashier" of the corporation, as that word is employed in section 542 of the Code of Civil Procedure, or a managing agent of such corporation. The word "cashier," in that section, refers to an executive officer of a corporation, — as the cashier of a bank, — and not to a simple employee, who is not a managing agent of the corporation.

Upon the evidence, we think it must be held that in the action referred to there never was any valid attachment of the property of the Esperanza Company, and as it was not personally served with summons in this state, the judgment alleged

in this complaint to have been recovered by plaintiff against that corporation was void. The implied finding of the court, therefore, that such judgment is valid, and is a lien upon the property in controversy, is not sustained by the evidence.

4. The remaining question to be considered is, whether, in view of the other allegations of the complaint, and found by the court to be true, the plaintiff is entitled to the relief which he asks, notwithstanding his failure to obtain a valid judgment against the Esperanza Company for the amount of the claim which he holds against that corporation. The general rule (to which, however, there are some exceptions) is, that a creditor must first have recovered judgment against his debtor, and execution thereon be returned unsatisfied, before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor: 3 Pomeroy's Eq. Jur., sec. 1415; Bump on Fraudulent Conveyances, 522. And this general rule is embodied in section 3441 of the Civil Code, which declares: "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation."

It is claimed by the appellant that the present case falls within this rule, and that as plaintiff has never recovered a valid judgment against the Esperanza Company, the foundation of his right to maintain this action is gone. But we are unable to agree to this proposition.

As already stated, the complaint charges that the Esperanza Company is wholly insolvent, and that defendant is now in possession of all of its property, without having paid any consideration therefor, claiming to own the same by virtue of the fraudulent transfers before mentioned, and that the defendant was organized by the officers and stockholders of the Esperanza Company for the purpose of taking and holding its property, and as part of a scheme to defraud and cheat the plaintiff and other stockholders of the Esperanza Company. These facts are all clearly alleged, and we think, as against a general demurrer and after judgment, the complaint may also be regarded as sufficiently averring that the notes executed to plaintiff by the Esperanza Company as evidence of its indebtedness to him are still unpaid. These are all material allegations, and upon his record, express findings having been waived, it must be presumed that they were all found to be true by the court below.

We think, upon this state of facts, a court of equity will regard the defendant as a mere continuation of the former corporation under a different name, and will hold it liable for the indebtedness of the Esperanza Company, at least to the extent of the value of the property which it received from it without consideration, and under the circumstances stated. Nominally, the two corporations may be different, but as viewed in equity, they are the same, and the plaintiff is not prevented from asserting such identity in fact. This was so, substantially, held in the case of *Hibernia Ins. Co. v. St. Louis etc. Trans. Co.*, 13 Fed. Rep. 516. In that case, upon a state of facts similar to that disclosed by this record, McCrary, circuit judge, after referring to the fact that it was doubtful whether any service of process could be made upon the old company so as to secure a judgment at law against it, proceeded to say: "A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process of law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts."

Treat, district judge, in a concurring opinion in that case, said: "A mere change of name cannot avoid obligations. The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones, — was, in short, the old corporation, — and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent, — that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than

the change of the name of a natural person can absolve him from his personal obligations.”

The principle of this decision, which we regard as eminently just, was also approved by the supreme court of Pennsylvania in *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585; 19 Am. St. Rep. 663.

It follows, from these views, that plaintiff is entitled to satisfy the demand against the Esperanza Company out of its property now held by the defendant, and that, too, without first recovering a nominal judgment against the Esperanza Company.

The complaint does not allege the rate of interest the notes there referred to bear, but the court recites in its judgment that such rate is eight per cent per annum. But the judgment does not declare that the amount unpaid on such notes is a lien upon the property in controversy, but that the judgment referred to in the complaint constitutes such a lien, and directs a sale of the property to satisfy the same. The amount of this judgment, including, as it does, costs of the former action, and interest upon the interest which had accrued upon said notes at the date of its rendition, exceeds the amount of the principal and interest of said notes, and is therefore erroneous. The court should ascertain the amount due upon the notes, and direct a sale of so much of the property in controversy as may be necessary to pay the same, and costs of the action and of making the sale.

Judgment and order reversed, with directions to the superior court to find the amount due the plaintiff from the Esperanza Company upon the notes referred to in the complaint, and thereupon to render judgment in accordance with this opinion.

CORPORATIONS, FOREIGN — HOW SUED. — A foreign corporation can only be sued in Massachusetts by means of attachment of its property, unless by virtue of an express statutory provision: *Andrews v. Michigan etc. R. R. Co.*, 99 Mass. 534; 97 Am. Dec. 51, and note.

ATTACHMENT — RETURN OF SHERIFF ON, AS EVIDENCE OF ITS VALIDITY. — As between the parties to the suit and their privies, an officer's return on a writ of attachment is conclusive; but as to third persons, it is simply *prima facie* evidence: *Chadbourn v. Sumner*, 16 N. H. 129; 41 Am. Dec. 720. The return of an officer, where he is a party, is merely *prima facie* evidence: *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713.

CORPORATIONS — SERVICE OF PROCESS — UPON WHOM MUST BE MADE. — A service of summons, to bind a corporation, must be upon the identical agent prescribed by statute: *Great West Mining Co. v. Woodmas etc. Mining Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note. Process may be served on agents

of foreign corporations doing business within the state as well as upon agents of domestic corporations: *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124, and note; *Burgess v. Aultman*, 80 Wis. 292; see extended note to *Hampson v. Weare*, 66 Am. Dec. 119. The service of process on any corporation other than a bank of circulation may be made on any agent thereof in the county in which he resides or in which the principal office of the corporation is located, whatever may be the employment of such agent: *Norfolk etc. R. R. Co. v. Cottrell*, 83 Va. 512.

CREDITOR'S BILL — NECESSITY FOR JUDGMENT BEFORE SUING OUT. — If creditors have obtained general judgments against their debtor's estate, but cannot take out execution thereon because of his death, and the estate is insolvent, no further proceeding at law is necessary for them to obtain relief by a creditor's suit against a fraudulent grantee: *Lyons v. Murray*, 95 Mo. 23; 6 Am. St. Rep. 17, and note. A creditor may, without a judgment at law, have a fraudulent sale set aside under the Mississippi statute: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 102. The contrary doctrine is held in *Massey v. Gorton*, 12 Minn. 145; 90 Am. Dec. 287; see also extended note to this case for a full discussion of the subject.

[IN BANK.]

BAINES v. BABCOCK.

[95 CALIFORNIA, 581.]

CORPORATIONS — CREDITOR'S SUIT TO RECOVER UNPAID SUBSCRIPTIONS TO STOCK OF. — A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same.

CORPORATIONS — EQUITABLE REMEDY OF CREDITOR OF, NOT SUPERSEDED BY SECTION 322 OF CIVIL CODE. — The remedy given by section 322 of the Civil Code of California, which fixes the personal liability of the stockholders of a corporation, is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

CORPORATIONS — LIABILITY OF STOCKHOLDERS UPON THEIR SUBSCRIPTIONS FOR STOCK SEVERAL, NOT JOINT. — The liability of a stockholder of a corporation on his subscription for capital stock is several, and not joint; it is not, therefore, necessary that all of the stockholders should be made parties defendant to an action brought by a judgment creditor of a corporation, who has exhausted his legal remedies against it, to subject the amount due from the stockholders for unpaid subscriptions for stock to the payment of his judgment.

CORPORATION — CREDITOR OF, MAY RESORT TO EQUITABLE REMEDY AGAINST STOCKHOLDERS WITHOUT PURSUING STATUTORY REMEDY. — A judgment creditor of a corporation who has exhausted his legal remedies against

the corporation may resort to equity to enforce payment of subscriptions to the capital stock, without having first pursued his statutory remedy against the stockholders, and he proves that he has exhausted his legal remedies against the corporation by introducing in evidence his judgment against it, with the return unsatisfied of the execution issued thereon.

RETURN OF EXECUTION — CONCLUSIVENESS OF. — In an equitable action by a judgment creditor of a corporation against its stockholders, the return of the execution issued upon his judgment unsatisfied is conclusive that he has exhausted his legal remedy, and it is not error for the trial court to refuse to allow the defendant to introduce evidence to show that the corporation was the owner and in possession of a large amount of personal property that might have been levied upon.

CORPORATION — CONCLUSIVENESS OF JUDGMENT AGAINST — ULTRA VIRES. — A judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of its creditors to subject its property to the satisfaction thereof, and, in the absence of fraud, equally conclusive upon the stockholders, when it is sought to satisfy the judgment out of the assets of the corporation in their hands; and therefore evidence offered by the stockholders, in the action against them, to show that the indebtedness for which the judgment against the corporation was recovered arose upon a contract which was *ultra vires*, is properly excluded by the trial court.

CORPORATION — ACTS OF, BIND ITS STOCKHOLDERS, IN ABSENCE OF FRAUD. — A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts; and with its right to maintain and defend actions concerning its corporate rights or liabilities, the stockholders cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action.

CORPORATIONS — PLEDGEE OR TRUSTEE OF STOCK LIABLE TO ITS CREDITORS AS REAL OWNER. — A person to whom stock of a corporation is issued, and in whose name the same stands on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee of the real owner. And therefore, in an action against a stockholder to subject the amount due from him for unpaid subscriptions to the capital stock to the payment of an unsatisfied judgment against the corporation, evidence is inadmissible to show that he was the real owner of only part of the shares of stock issued to him by the corporation, and that the other shares standing in his name were owned by other persons, and were issued to him for the purpose of negotiating a loan for the real owners.

Hunsaker, Britt, and Goodrich, Works, Gibson, and Titus, Sprigg and Barber, and Brunson, Wilson, and Lamme, for the appellants.

Frank W. Burnett, Myrick and Deering, McNealy, Trippett, and Neale, and M. S. Babcock, for the respondent.

THE COURT. This cause was submitted in Department, and a decision was rendered therein, affirming the judgment, on September 23, 1891. Thereafter, on petition of appellants, a rehearing was granted, and the cause was submitted in Bank.

We have given to the arguments and briefs of counsel, and the cases therein cited, careful attention and consideration, and are satisfied with the opinion and conclusion of Department Two. Some of the points might be more elaborately discussed and additional authorities cited in support of the conclusions reached, but we deem it unnecessary to do so.

For the reasons given in the opinion of Mr. Justice De Haven in Department, the judgment and order are affirmed.

The following is the opinion, above referred to, rendered in Department Two on the 23d of September, 1891:—

DE HAVEN, J. This is an action to subject the amount due from defendants for unpaid subscriptions for stock in the San Diego Street Car Company to the payment of a judgment in favor of plaintiff, and against said corporation. The findings of the court, following the allegations of the complaint, show that execution was issued upon this judgment, and by the sheriff returned unsatisfied, because he could find no property of the corporation to apply to the satisfaction thereof. It is also alleged and found that the officers of the corporation have neglected and refused to make any assessment upon its stock, or to collect the balance remaining unpaid upon subscriptions for its stock. The plaintiff recovered judgment, and from this, and an order denying their motion for a new trial, the defendants appeal.

1. It is well settled that a judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. The action is sustained upon the principle that such unpaid subscriptions are a part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which creditors may look for the payment of their claims; and when the corporation neglects to call them in, a court of equity will enforce their payment: *Sanger v. Upton*, 91 U. S. 56. The contention of appellants, that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that

the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in *Harmon v. Page*, 62 Cal. 448. The remedy given by that section of the code is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

2. All the stockholders were not made parties defendant, and the objection to their non-joinder was taken both by demurrer and answer. The objection is not well taken, although the rule contended for by appellants finds support in some of the decided cases. The precise question arose in the case of *Hatch v. Dana*, 101 U. S. 205; and it was there held, in an opinion the reasoning of which seems to us to be conclusive, that it is not necessary that all the stockholders should be made defendants in this kind of an action. The court there say: "The liability of a stockholder for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. . . . It may be that if the object of the bill is to wind up the affairs of this corporation, all the share-holders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent multiplicity of suits. But this is no such case. The most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes." And this rule is followed by other courts: *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; *Bartlett v. Drew*, 57 N. Y. 587; *Brundage v. Monumental etc. Mining Co.*, 12 Or. 322.

3. It was not necessary for plaintiff to show that he had pursued his statutory remedy against the stockholders. The rule is, that a creditor has a right to resort to the equitable remedy invoked by the plaintiff in this action after he had exhausted his legal remedies against the corporation, and this was shown in this case by plaintiff's judgment, and the return of the execution issued thereon unsatisfied.

4. The court did not err in refusing to allow defendants to show that the corporation was the owner and in possession of a large number of street-cars and other personal property, and a line of street-railway and of valuable franchises within the city of San Diego. The purpose of this offered evidence was to show that plaintiff had not exhausted his legal remedy upon his judgment, but was not competent for that purpose. The rule upon this point is thus stated by Mr. Justice Field in *Jones v. Green*, 1 Wall. 332: "The court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows the remedy afforded at law has been pursued, and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy."

5. The appellants offered to show that the indebtedness for which plaintiff's judgment against the corporation was recovered arose upon a contract which was *ultra vires*. The evidence was excluded, and this ruling is assigned as error. The question is thus presented, whether such judgment is conclusive upon the stockholders of the corporation in this action, and that it is we entertain no doubt. The object of this suit is to compel the corporation against whom the judgment was recovered to satisfy the same out of its assets, and it is not competent for the defendants, who are simply called upon to pay what they owe to the corporation in order that its obligations may be discharged, to reopen the question whether, upon the facts, the plaintiff ought to have had judgment against the corporation. The judgment was a conclusive determination of that fact as against the corporation and all persons in privity with it, and carries with it, without relitigating the facts upon which it is based, the undoubted right of enforcement against the property of the corporation, and that is

all that is sought in this case. A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. The right to sue and be sued, to maintain and defend actions concerning corporate rights and corporate liabilities, is a power incident to every corporation. In this state it is not only conferred by statute, but is preserved by constitutional provision: Const., art. 12, sec. 4. And with this right of the corporation to maintain and defend actions concerning its corporate rights or liabilities the stockholder cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action: *Newby v. Oregon Cent. R. R. Co.*, 1 Saw. 63; *Memphis City v. Dean*, 8 Wall. 73; *Ware v. Bazemore*, 58 Ga. 816; *Greaves v. Gouge*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 378. It must necessarily follow, from the nature of this corporate power, that a judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and in the absence of fraud, equally conclusive upon the stockholder when it is sought to satisfy the judgment out of the assets of the corporation in his hands. This was so held in *Marsh v. Burroughs*, 1 Woods, 471. Mr. Justice Bradley, in delivering the opinion of the court in that case, said: "The stockholders of the bank cannot ask to go behind the judgments rendered against the bank and question the original cause of action, unless they can show collusion between the plaintiff and the bank, entered into for the purpose of defrauding the stockholders." And this view is also sustained by the following cases: *Glenn v. Williams*, 60 Md. 93; *Henry v. Elder*, 63 Ga. 347; *Lehman v. Glenn*, 87 Ala. 618; *Stephens v. Fox*, 83 N. Y. 317; *Merchants' Bank v. Chandler*, 19 Wis. 435. See also Morawetz on Private Corporations, sec. 865.

6. The appellant Babcock offered to show upon the trial that he was the real owner of only 425 of the shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as a matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded, and in our opinion the ruling was correct. It seems to be well

settled that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner: *National Bank v. Case*, 99 U. S. 631; Cook on Stockholders, secs. 249—253; Thompson on Stockholders, sec. 223; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797. The foregoing views dispose of all the questions presented by this appeal requiring special discussion.

Judgment and order affirmed.

IN THE CASE OF *Potter v. Dear*, 95 Cal. 578, it was decided that a judgment creditor who has exhausted his legal remedies against a corporation may maintain a creditor's bill against one or more stockholders to recover the amount due to the corporation upon unpaid subscriptions to its stock; that the corporation is not an indispensable party to such bill, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of all the affairs of the company, and if the action is against a single stockholder, objection to the non-joinder of the corporation is waived, if not made by demurrer or answer; and that a court of equity will entertain jurisdiction of an action by a judgment creditor who has exhausted his legal remedies against the corporation to compel payment of unpaid subscriptions to its stock, without regard to the exhaustion of any concurrent legal remedy against the stockholders upon their individual liability.

CORPORATIONS — CAPITAL STOCK — RIGHTS OF CREDITORS. — The capital stock of a corporation constitutes the basis of its credit, and persons dealing with it have a right to assume that the stock subscription has been paid, or that it can be reached for corporate debts: *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 92 Ala. 407; 25 Am. St. Rep. 65, and note; and the creditors have a right to insist upon the collection of such subscription: *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis. 427; 23 Am. St. Rep. 417, and note; *Bailey v. Pittsburg Coal R. R. Co.*, 139 Pa. St. 213; see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806—811; extended note to *Germantown etc. R'y Co. v. Filler*, 100 Am. Dec. 552. In order to maintain such a suit, a creditor must show that there were no other assets of the corporation out of which the debt could have been satisfied: *Burch v. Taylor*, 1 Wash. 245.

CORPORATIONS — LIABILITY OF STOCKHOLDERS JOINT, NOT SEVERAL. — The liability of stockholders of a corporation to its creditors is joint, not several: *Abbey v. W. B. Grimes etc. Co.*, 44 Kan. 415; see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 815, 852—854; extended note to *McCarthy v. Lavasche*, 31 Am. Rep. 88.

CORPORATIONS. — A CREDITOR MUST EXHAUST LEGAL REMEDIES before proceeding in equity against the stockholders of a corporation for unpaid subscriptions: See extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 814; also *Dreisback v. Price*, 133 Pa. St. 560.

EXECUTION — CONCLUSIVENESS OF RETURN. — A return of a levy of execution is, in New Hampshire, conclusive evidence that the debtor's title to the property and those claiming under him by title subsequent to the attachment passed to the judgment creditor: *Ladd v. Wiggin*, 35 N. H. 421; 69 Am. Dec. 551, and note. A return of an officer is conclusive on parties to the record when collaterally attacked: *Doe v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57, and note; *Stevens v. Brown*, 3 Vt. 420; 23 Am. Dec. 215, and note.

CORPORATIONS — CONCLUSIVENESS OF JUDGMENT AGAINST, AS TO UNPAID STOCK SUBSCRIPTIONS. — A judgment against an insolvent corporation, foreclosing a deed of assignment made by it, is conclusive on the stockholders as to all corporate matters and property rights and interests in the corporation: *Scuple v. Glana*, 91 Ala. 245; 24 Am. St. Rep. 894, and note. As to the conclusiveness of a judgment against a corporation in a creditor's suit to reach unpaid stock subscriptions, see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 814-815, 858; see *Tatum v. Rosenthal*, 95 Cal. 129; ante, p. 97, and note.

CORPORATIONS. — WHO ARE STOCKHOLDERS LIABLE TO CREDITORS FOR UNPAID SUBSCRIPTIONS: See extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 829. A subscriber to the capital stock of a corporation who has, in good faith, transferred his shares to another, the transfer having been accepted by the corporation before an assessment, is not liable for the unpaid subscription: *Stewart v. Walla Walla Printing etc. Co.*, 1 Wash. 521; *Citizens' etc. Sav. Bank v. Gillespie*, 115 Pa. St. 564. When shares of a corporation are held by a person as trustee for another, the legal owner is primarily liable both to the company and its creditors: *Winston v. Dorsett Pipe etc. Co.*, 129 Ill. 64.

PEOPLE v. LEE KONG.

[95 CALIFORNIA, 666.]

ASSAULT WITH INTENT TO MURDER, PERSON INTENDED TO BE KILLED NOT BEING WHERE ACCUSED THOUGHT HE WAS. — When a policeman bores a hole in the roof of a building, in order to ascertain from observation whether or not the occupant is conducting a gambling or lottery game therein, and such occupant, believing the policeman to be on the roof at the point of contemplated observation, fires his pistol at that spot with intent to kill, he is guilty of an assault with intent to commit murder, although the policeman was not at the spot when the shot was fired, but was upon another part of the roof.

ASSAULT — UNLAWFUL ATTEMPT AND PRESENT ABILITY NECESSARY TO CONSTITUTE. — To constitute an assault, there must be an unlawful attempt and a present ability to inflict the injury.

CRIMINAL ATTEMPT FRUSTRATED BY UNKNOWN OBSTRUCTION. — Where the criminal result of an attempt is not accomplished, simply because of an obstruction in the way of the thing to be operated upon, which is unknown to the aggressor at the time, the criminal attempt is committed.

PRESENT ABILITY TO MURDER, PERSON HAS, WHEN. — A person has the present ability to commit an intended murder when he has a loaded pistol, and the intended victim is within reach of its shot, and the fact that the perpetrator was mistaken as to the exact spot where his intended victim was at the time of the firing is immaterial.

O. C. Stephens and H. C. Grant, for the appellant.

W. H. H. Hart, attorney-general, for the respondent.

GAROUTTE, J. Appellant was convicted of the crime of an assault with intent to commit murder, and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict.

The facts of the case are novel in the extreme, and when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent.

A policeman secretly bored a hole in the roof of appellant's building for the purpose of determining, by a view from that point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the contemplated point of observation, he fired his pistol at the spot. He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but very fortunately for the officer of the law, at the moment of attack he was upon the roof at a different spot, viewing the scene of action, and thus no substantial results followed from appellant's fire.

The intent to kill is quite apparent from the evidence, and the single question is presented, Do the facts stated constitute an assault? Our Criminal Code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt, and there must be a present ability, to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one. For the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country, that where the criminal result of an attempt is not accomplished, simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is

committed. Thus an attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny: *State v. Wilson*, 30 Conn. 500; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *People v. Moran*, 123 N. Y. 254; 20 Am. St. Rep. 732.

Having determined that appellant was guilty of an unlawful attempt to kill, was such attempt coupled with the present ability to accomplish the deed? In the case of *People v. Yslas*, 27 Cal. 633, this court said: "The common-law definition of an assault is substantially the same as that found in our statute." Conceding such to be the fact, we cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear. Under our statute it cannot be said that a person with an unloaded gun would have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be. It was held in the case of *State v. Swails*, 8 Ind. 524, that there was no assault to commit murder where A fires a gun at B at a distance of forty feet, with intent to murder him, if the gun is in fact loaded with powder and a slight cotton wad, although A believes it to be loaded with powder and ball. The later Indiana cases support this rule, although in *Kunkle v. State*, 32 Ind. 230, the court, in speaking of the Swails case, said: "But if the case is to be understood as laying down the broad proposition that to constitute an assault . . . with intent to commit felony, the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval." In the face of the fact that the statute of this state in terms requires that in order to constitute an assault the unlawful attempt and present ability must be conjoined, *Kunkle v. State*, 32 Ind. 230, can have no weight here. In *State v. Napper*, 6 Nev. 115, the court reversed the judgment upon the ground that the people failed to prove that the pistol with which the assault was alleged to have been made was loaded, and that consequently there was no proof that the defendant had the present ability to inflict the injury.

It is not the purpose of the court to draw nice distinctions between an attempt to commit an offense and an assault with intent to commit the offense, for such distinctions could only have the effect to favor the escape of criminals from their just deservings. And in view of the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no object in carrying the discussion of the subject to any greater lengths.

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet: See *Cowley v. State*, 10 Lea, 282. The fact that the shots were directed indiscriminately into the house, rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point, could not affect the question. The assault would be complete and entire in either case. If a man, intending murder, being in darkness and guided by sound only, should fire, and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol-ball, the crime of assault to commit murder would be made out; for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, or if through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course from the intended point of attack, and by reason of the occurrence of any one of these contingencies

the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established.

The fact, of itself, that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired, is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt.

Let the judgment and order be affirmed.

HARRISON, J. (concurring). I concur in the judgment, upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability — that is, an ability by the means then employed by him in furtherance of such attempt — to commit murder upon the policeman.

CRIMINAL LAW — ASSAULT WITH INTENT TO KILL — NECESSITY FOR PRESENT ABILITY. — To constitute an assault, there must be an intentional attempt to do injury to the person of another, coupled with the present ability to do the injury attempted: *State v. Godfrey*, 17 Or. 300; 11 Am. St. Rep. 630, and note; *State v. Swails*, 8 Ind. 524; 65 Am. Dec. 772, and note. In an indictment for assault, it is sufficient to charge present ability in the language of the statute: *Marshall v. State*, 123 Ind. 128. It is sufficient to allege in the indictment that the assault was committed in the manner and with the intent necessary to constitute the offense, without expressly averring the "present ability" necessary under the statute to constitute the assault: *Russell v. State*, 52 Ark. 276. As to what constitutes an assault with intent to kill, see note to *Patterson v. State*, 21 Am. St. Rep. 155. See also note to *Chrisman v. State*, 26 Am. St. Rep. 47. Where one, intending violence to another, sheltered within a house, casts upon the roof of the house lighted dynamite cartridges, known to possess sufficient explosive power to crush the house and kill the inmates, but which failed of that result only because they rolled from the roof before exploding, he is guilty of an actual assault with intent to kill: *Cooley v. State*, 88 Tenn. 250.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

MASCOLO v. MONTESANTO.

[61 CONNECTICUT, 50.]

CONSIDERATION. — **THE WITHDRAWAL OF A CIVIL ACTION** against a minor son of the maker of a note is a consideration sufficient to support it, when such son had been arrested in the action, and his release was procured by the execution of a note and the consequent dismissal of the action.

CONSIDERATION. — **ANY DAMAGE, OR ANY SUSPENSION OF A RIGHT, OR ANY LIABILITY TO A LOSS** occasioned to one by the promise of another is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor.

CONSIDERATION. — **A FORBEARANCE TO SUE, OR A DISMISSAL OF A SUIT** already begun, is a sufficient consideration for a promise, though the promisor has no direct interest in the suit and is not directly benefited by the delay.

DURESS OF IMPRISONMENT cannot exist when the imprisonment is lawful. If, therefore, a man, supposing he has a right of action against another, causes him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid it for duress of imprisonment, although in fact plaintiff had no right of action.

PARTIES TO A CRIMINAL ACT CANNOT BE IN PARI DELICTO when one of them could not consent to the act because he was not within the age of consent.

J. P. Goodhart, for the appellant.

P. Pond and *W. Pond*, for the appellee.

ANDREWS, C. J. A minor son of the defendant was sued in a civil action for an assault and battery and his body attached. The defendant went with his son and the officer to the office of the attorney who had issued the complaint. He there met the plaintiff, and such negotiations were had that the defendant paid twenty dollars in money and gave his note for the sum of eighty dollars to the plaintiff, and the action for assault was withdrawn. The note was in these words:—

“NEW HAVEN, CONN., April 5, 1890.

“For value received, in consideration of the withdrawal of a suit against my son Achillo Montesanto without further costs, I promise to pay to the order of John Mascolo eighty dollars on demand.
GIUSEPPE MONTESANTO.”

The case was tried in the city court of the city of New Haven. The defendant admitted that he signed the note, but denied that there was any lawful consideration therefor, and he claimed that the signature was obtained from him by duress, fraud, and deceit. The court made a finding of facts as follows: On April 5, 1890, Angelo Mascolo, a minor about twelve and one half years of age, by his father and next friend, the plaintiff in this case, brought a civil action, by A. H. Moulton, attorney, against Achillo Montesanto, a minor about fifteen and one half years of age, the son of Giuseppe Montesanto, the defendant in this case, by writ and complaint duly issued and returnable before J. W. Chapin, justice of the peace, in which complaint it was alleged that the said Achillo Montesanto made an assault upon and had committed buggery upon and with said Angelo Mascolo, and that in the commission of the assault he had greatly injured him, and communicated a loathsome disease to him, whereby he became sick and disabled, and was subjected to great expense for medical service, care, and attendance, for which damages in the sum of one hundred dollars were demanded in the action. The writ and complaint were duly served by Michael R. Enscoe, a constable of the town of New Haven, who, by special direction of Moulton, the attorney, attached the body of Achillo Montesanto, took him into custody, and brought him to the office of the attorney. Giuseppe Montesanto followed his son Achillo to the office, and there met the attorney and John Mascolo, the father of Angelo. The plaintiff and defendant, being Italians unable to speak the English language, called one Richards into the office to act as interpreter, and through him oral communications were made between the attorney, Montesanto, and Mascolo concerning the arrest and the case. Through the interpreter, an agreement was entered into, with the knowledge, consent, and under the advice of the attorney for the plaintiff in the original suit, between John Mascolo, father and next friend of Angelo Mascolo, the boy claimed to be so injured, and Giuseppe Montesanto, father of Achillo, the boy who it was claimed committed the injury, which agreement the court

finds to have been as follows: That upon condition of the withdrawal of the civil action of Angelo Mascolo, by his father and next friend, John Mascolo, against Achillo Montesanto, he, Giuseppe Montesanto, would pay to John Mascolo the sum of twenty dollars down, and also give his promissory note for the sum of eighty dollars, payable to the order of John Mascolo, on demand; which payment was then and there made, and the note given after having been read to the maker by the interpreter; which note is the subject of this suit. The court further finds that previous to the making of this agreement Giuseppe Montesanto, the defendant, requested Moulton, the original plaintiff's attorney, through the interpreter, to inform him as to what claims were made against the defendant's son Achillo in the civil suit; that the attorney fully and plainly explained to him all that was claimed in the suit, and in reply to Montesanto's inquiries as to his son's liability to any other claim, Moulton informed him that he might be liable to a criminal prosecution for the offense, and at the same time informed him that he had no control as to such criminal prosecution, and that any settlement of the pending civil case would not and could not make any difference as to such criminal prosecution.

The court finds that while the agreement was pending a friend suggested to Montesanto, the defendant, that he would give a continuance bond for the defendant's son if desired, but the defendant declined to ask for continuance or to accept the proffered bond, and that he voluntarily paid the sum of twenty dollars, and gave the note for eighty dollars, solely upon the condition that the civil action would be withdrawn and his son released. Upon payment of the twenty dollars and the delivery of the note by the defendant to the attorney for the plaintiff, the suit was withdrawn, and the defendant's son was released and took an early departure from the jurisdiction. No return of the writ was ever made to the justice of the peace.

Upon the foregoing facts, the defendant claimed that he gave the note under a misapprehension of the facts, and therefore was not liable to pay the same; that there was no valid consideration for the note, and that therefore he was not liable to pay it; that he was constructively under duress when he executed and delivered the note, and therefore was not legally liable to pay it; and that his son being actually under duress when the note was given for the purpose of securing his re-

lease, it nullified any obligation of the defendant, as maker of the note, to pay it.

The court overruled each of these claims, to which ruling the defendant excepted, and rendered judgment against the defendant for the amount of the note, with interest and costs. From that judgment the defendant has appealed to this court, and assigns seven reasons of appeal.

The first, fourth, and fifth reasons are, in substance, that the note was without a valid consideration. We think, however, that a sufficient consideration appears. The note is expressed to be for value received. These words indicate a sufficient consideration, in the absence of anything to the contrary. In this note not only is there nothing to the contrary, but a good consideration expressly appears. The withdrawal of the suit against his son without further costs was a sufficient consideration for the promise contained in the note. "Any damage, or any suspension of a right, or any liability to a loss occasioned to one by the promise of another is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor": 1 Rev. Swift's Digest, top page 195. "A promise in consideration of ceasing a suit is good, for that is a benefit to the defendant as well as a damage to the plaintiff, though the action is not discharged": 1 Rev. Swift's Digest, top page 196. The authority cited by Judge Swift on this point is *Bidwell v. Catton*, Hob. 216. That case was as follows: Bidwell, an attorney, brought an action on the case against Catton, executor of Reve, and counted that whereas he had in Michaelmas term (14 Jac.) prosecuted an attachment of privilege against Reve, the testator, recognizable in Hilary term, the testator, knowing of it, in consideration that at his request the plaintiff would forbear to prosecute said suit any further against the testator, did promise to pay him fifty pounds, and then averred, etc. After verdict, it was excepted, in arrest of judgment,—1. That it was not alleged that the plaintiff had any just cause of action; and 2. That the action still remains. But the court nevertheless gave judgment. For, 1. Suits are not presumed causeless, and the promise argues cause, in that he desired to stop off the suit; 2. Though this did not require the discharge of the action, yet it did require a loss of the writ and a delay of the suit, which was both a benefit to the one and a loss to the other: *Sage v. Wilcox*, 6 Conn. 81; *Stoddard v. Mix*, 14 Conn. 12; *Pratt v. Hum-*

phrey, 22 Conn. 317. Nor is it material that the party who makes the promise in consideration of such forbearance should have a direct interest in the suit to be forborne, or be directly benefited by the delay. It is enough that he requested delay: *Smith v. Algar*, 1 Barn. & Adol. 603; 1 Chitty on Contracts, 11th ed., 39, 41; 1 Parsons on Contracts, 5th ed., 443.

The second reason of appeal is, that the note was given under duress, and so was void. All actual duress is excluded by the finding. The court recites the facts at some length. They certainly tend to show that the defendant acted deliberately, on a full understanding of his rights and liabilities, and that he declined further delay when the opportunity for an adjournment was offered to him. And the court adds that he voluntarily paid the money and gave the note solely upon the condition that the civil action should be withdrawn and his son released. The arrest of the son upon the action for the assault and battery was clearly lawful. "If a man be lawfully imprisoned, and either to procure his discharge or on any other fair account seals a bond or a deed, this is not duress of imprisonment, and he is not at liberty to avoid it": 1 Bla. Com. 137. "It is a general rule that imprisonment by order of law is not duress; but to constitute duress of imprisonment, either the imprisonment, or the duress must be tortious and unlawful. If, therefore, a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action": Parsons, C. J., in *Watkins v. Baird*, 6 Mass. 511; 4 Am. Dec. 170; 1 Rev. Swift's Digest, top page 306; *Walbridge v. Arnold*, 21 Conn. 431; *Downing v. Ely*, 125 Mass. 369. We think there was no constructive duress. It is not claimed that any threats were made. The defendant and his son seem to have fully understood that the son was still liable to a criminal prosecution, as he immediately departed this jurisdiction.

The third reason of appeal is, that the son of the plaintiff was *in pari delicto* with the son of the defendant, and that for such reason there could have been no recovery in the original suit; the argument being, that a promise for the forbearance of a suit which could not possibly be maintained cannot be enforced. This assumes that the plaintiff's son consented to the act done by the defendant's son. But it is not so. The

plaintiff's son did not consent; he could not consent; he was within the age of consent. If he submitted without resistance, still the act was done by force. There could be no *delictum* on his part.

The questions presented by the sixth and seventh reasons of appeal were not raised in the trial court.

There is no error in the judgment appealed from.

NEGOTIABLE INSTRUMENTS — CONSIDERATION — SURRENDER OF SOME RIGHT. — A promissory note made payable on condition that the payee abstain for a certain time from the use of intoxicating liquors is supported by a good consideration: *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395.

NEGOTIABLE INSTRUMENTS — CONSIDERATION — FORBEARANCE TO SUE. — A promise of forbearance to sue a third person for a certain time is a sufficient consideration to support a note: *Jennison v. Stafford*, 1 Oush. 168; 48 Am. Dec. 594, and note.

DURESS OF IMPRISONMENT — WHAT IS. — Lawful imprisonment is not duress: *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261, and note. A contract made under a threat of unlawful imprisonment, the fear of the threat being the moving cause for its execution, is a contract made under duress, and the maker may avoid it: *Morrison v. Faulkner*, 80 Tex. 128. One imprisoned under lawful process on an unfounded cause of action cannot avoid a contract made to procure his release on the ground of duress: *Clark v. Turnbull*, 47 N. J. L. 265; 54 Am. Rep. 157. Duress exists when there is actual arrest or imprisonment without lawful authority, or threats of unlawful arrest or imprisonment: *Belote v. Henderson*, 5 Cold. 471; 98 Am. Dec. 432, and note.

ROWLAND v. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

[61 CONNECTICUT, 108.]

CONTRACT ENTERED INTO THROUGH THE MISTAKE OF THE PARTIES thereto respecting its contents is not binding upon them, and if one of them performs services for the other in consequence of such contract, he is entitled to recover reasonable compensation therefor, though in excess of the price named in the contract.

CARRIERS — MISTAKE AS TO FREIGHT CHARGES TO BE PAID. — If a person, desirous of shipping articles from one point to another over a railway, inquires at its office, of its freight cashier, what the charges will be, and the latter, in turn, inquires of the way-bill clerk, whose duty it is to know what such charges are, and the latter, misunderstanding the place to which shipment is to be made, gives an incorrect answer, according to which the charges are computed and paid in advance, the railroad company is not bound by the answer thus made, and may, after shipping the goods to the place designated, and there delivering or offering to deliver them, recover such additional sum as may be required to reasonably compensate it for the services rendered.

J. P. Fyatt and W. S. Pirlee, for the appellant.

W. K. Townsend and G. D. Warren, for the appellee.

TORRANCE, J. On the 14th of August, 1889, the plaintiff, at the defendant's freight-office in Waterbury, asked the freight cashier what the rate of freight was from Waterbury to Branford on certain described goods. At the time, such rate had been fixed and established by the defendant, and published in a book and tariff-sheet, which then hung in the office, for the information of shippers, and convenient for their use. The defendant's employees had no authority to give any other rates for carrying freight than those contained in this book and tariff-sheet, and had no means of knowing the rates except by consulting the book and sheet.

It was no part of the duty of the freight cashier to know the rates, or to answer questions concerning them. Such duty devolved upon the way-bill clerk, who was in the same office. When the plaintiff asked said question, the freight cashier, not knowing what the rate was, turned and inquired of the way-bill clerk what the rate was. On account of the noise made by a passing train, and by persons in the office, the way-bill clerk understood the inquiry to be for the rate to Milford, and in reply gave from the book and tariff-sheet the rate to Milford, namely, thirteen cents per hundredweight, instead of the rate to Branford, which was twenty-one cents per hundred. Thereupon the freight cashier, on account of the mistake, in figuring up the amount that would be due on the plaintiff's goods to Branford, adopted the rate to Milford instead of the rate to Branford, making the amount \$9.75 instead of \$15.75, which was the true tariff rate. The next day the plaintiff delivered his goods to the defendant, paid the \$9.75, and took a receipt therefor. He requested the freight to be sent forward immediately, and said he was going to take the train then standing in front of the freight-office.

Shortly after the plaintiff left, the way-bill clerk discovered the mistake. The defendant's employees then tried to find the plaintiff to inform him of the mistake, but learning that he had left town, and not knowing where they could communicate with him, and knowing that he desired the goods to go forward immediately, forwarded the same, with instructions to the station agent at Branford to adjust the matter and collect the additional six dollars, as was usual in cases of such mistake.

On the arrival of the goods at Branford, the mistake was fully explained to the plaintiff, and the defendant's agent there refused to deliver the goods to the plaintiff unless the latter would either pay or agree to pay the six dollars. The plaintiff demanded that the property should be delivered to him then and there, and refused to pay or agree to pay the six dollars. The defendant's tariff rates for freight were fair and reasonable rates, and had been in force for five years prior to August, 1889. The goods have ever since remained in the custody of the defendant.

On the 17th of March, 1890, the plaintiff brought this action to recover the value of the goods. On the 29th of March, 1890, the defendant tendered the goods to the plaintiff, free of charge, but the plaintiff refused to accept them, on the ground that the defendant, by its acts, had converted the property, and was liable for the full value thereof. There was no evidence that the plaintiff had suffered any injury by being deprived of the property from the time of its arrival in Branford to the time it was tendered to him. If the plaintiff had been informed before shipping the goods that the freight charge would be \$15.75, he would have paid that sum, and shipped them as they were shipped.

The case was tried to the jury, and the record shows that the above constitute all the material facts concerning which evidence was given on the trial, and that, except with reference to the value of the property, there was on the trial no conflicting evidence.

Under these circumstances, in charging the jury, the court, having called their attention to the pleadings and the issues to be decided, stated to them, in substance, that questions of fact were to be decided by the jury and questions of law by the court; that in the present case there appeared in the evidence no conflict whatever, and no disputed question of fact for the jury to decide. The court thereupon detailed to the jury, as facts concerning which there was no conflict in the evidence, the facts above set forth, and instructed them, that assuming these to be the facts in the case, the plaintiff was not, as a matter of law, entitled to recover; that if the jury found that there occurred such a mistake and misunderstanding as to the destination of this freight when the rates were given to the plaintiff, there was, as matter of law, no such meeting of the minds of the parties as constituted a contract by the defendant to carry the freight from Waterbury to Bran-

ford for the sum of \$9.75; and that the defendant was entitled to charge a fair and reasonable sum, and that the refusal to deliver the goods until such sum was paid was not such an appropriation or conversion of the goods as entitled the plaintiff to recover.

The errors assigned are two in number, namely, in charging the jury,—1. “That, assuming these [the facts detailed in the finding] to be the facts in the case, the plaintiff was not, as matter of law, entitled to recover”; and 2. “That the refusal of the defendant to deliver the freight at Branford until such sum was paid was not such an appropriation or conversion of the goods as entitled the plaintiff to recover.”

From the pleadings in the case, and from the facts detailed in evidence, it is apparent that one of the main questions in the case was, whether the contract which was in form entered into between the plaintiff and defendant was void on account of the mistake on the part of the defendant set up in the pleadings and shown in evidence. The court, in substance, told the jury that it was their duty to find the facts from the evidence; that as there was on the material facts in the case no conflicting evidence, the court would assume them to be proved; and that if the jury found them to be proved, then on such assumption there was, as matter of law, no contract, and the plaintiff was not entitled to recover.

This, we think, is the fair import of the charge. It proceeds upon the assumption that the facts detailed in evidence and upon the record are true; that a mistake as to the rate for freight between Waterbury and Branford was made in the way and manner and under the circumstances set forth upon the record; and that the jury would so find. The jury were told that such a mistake prevented the formation of a contract between the plaintiff and defendant to carry the goods for \$9.75. The plaintiff claims that such a mistake did not prevent the formation of such contract. The question therefore is, whether, assuming the facts to be as they are detailed on the record, the court charged the jury correctly.

The plaintiff applied at the freight-office of the defendant for information concerning the rate of freight upon certain goods between Waterbury and Branford. He found there two employees, one called the freight cashier, the other the way-bill clerk. Both of them were present in the same office, attending to their appropriate duties, which were separate and distinct. The plaintiff asked the freight cashier what such

rate was. The cashier did not know, nor was it his duty to know, what the rate was; he therefore turned to the way-bill clerk and repeated to him the plaintiff's question. The way-bill clerk, by an innocent mistake, supposed the plaintiff's question to be, What is the rate from Waterbury to Milford? and, solely on account of this mistake, after informing himself from the tariff-sheet and freight-book, gave the rate between the two last-named points. The defendant could only make the contract through its agent or agents, and the two clerks, on the assumed state of facts, were the agents through whom the plaintiff attempted to contract with the defendant.

The plaintiff's question, though at first and in form addressed to the freight cashier, was in fact and finally addressed to the way-bill clerk, and by him alone it was answered. He, therefore, and not the freight cashier, in fact fixed the terms of the proposal made by the defendant as to the only point that was then of any importance to the plaintiff or defendant, namely, the rate. It was just as if the plaintiff had seen the way-bill clerk alone, and had addressed to him his question, and had been answered by mistake, and the freight cashier had figured up the amount, taken the money, and given a receipt based upon information given him by the way-bill clerk or the plaintiff. Looking, then, at the substance of the matter, rather than its form, the proposal to carry the goods for thirteen cents per hundredweight was made by the way-bill clerk rather than by the freight cashier. In point of fact, all the latter did was to figure up what the aggregate charge would be, based upon the statement made by the way-bill clerk, take the pay therefor, and give a receipt.

Under such circumstances, it is plain that the defendant understood the question to be, What is the rate to Milford? and made a proposal based upon that understanding, which was, in effect, a proposal to carry the goods to Milford, while the plaintiff understood the proposal to be to carry the goods to Branford.

No question is raised upon the record as to negligence on the part of the defendant or its agents in this matter, nor as to estoppel, nor as to the sufficiency or correctness of the charge in any respect except as stated in the reasons of appeal.

On the assumed state of facts, we think the minds of the parties never met, on account of this fundamental error or mistake, the result being that the contract attempted to be made was not in fact made. In this view of the matter, the case

comes clearly within the principles laid down in the case of *Hartford etc. R. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177, and must be governed thereby. The plaintiff, in his brief, assumes that the proposal was made by the freight cashier, and not by the way-bill clerk. He says that whether he dealt with the one or the other was a question of fact for the jury to decide; and that the court either decided this question of fact, and held that the plaintiff dealt with the cashier, or held that it made no difference with which one he dealt.

We think, as is apparent from what has already been said, that the plaintiff is wrong in his assumption that the proposal was made by the freight cashier. The facts do not warrant the assumption. It is true that whether the plaintiff dealt with the one or the other was a question of fact, but the court did not decide it as a question of fact, nor, if so, is that question before us. The question before us is, whether, assuming the truth of the facts disclosed by the record, the court, in the part of the charge now in question, stated correctly the law applicable thereto. We hold that it did, and that there is no error upon this point.

The remaining question is, whether the court erred in charging the jury as set forth in the second reason of appeal. The goods were carried to Branford, and no claim seems to have been made on the trial below, and it is not made before us, that by so doing the defendant had expressly or impliedly agreed to carry them there for \$9.75. The facts of record afford no warrant for finding the existence of such a contract, and we must assume that the jury found that there was none.

The plaintiff demanded that his goods should be delivered to him at Branford, and insisted upon this. Had his supposed contract with the defendant been a valid one, he would have been entitled to such delivery without further payment. But there was no such contract. The defendant had performed a valuable service for him, and proposed to charge him a reasonable and fair rate therefor, which rate, but for an innocent mistake, he would have paid. He insisted upon retaining the benefit of the service rendered him, without paying therefor the regular and reasonable rate. That he did this under the mistaken belief that he had made a special contract for such services can make no difference.

The part of the charge now in question was based upon the assumption that the jury would find that there was no special contract to carry the goods for \$9.75; that there was no sub-

sequent contract, express or implied, to carry them for that price; that the goods had been taken to Branford under such circumstances as would entitle the defendant to reasonable compensation for its services; that the rate charged was reasonable, and that the plaintiff insisted upon the delivery of the goods to him at Branford.

Upon such a state of facts, which we must assume the jury found to be true, the charge of the court was correct.

There is no error apparent upon the record.

MISTAKE — RELIEF AGAINST CONTRACTS ENTERED INTO THROUGH. — Mistake of a material fact, when an act is done or a contract made, will be relieved against in equity: *Jenks v. Fritz*, 7 Watts & S. 201; 42 Am. Dec. 227, and note; *Emerson v. Navarro*, 31 Tex. 334; 98 Am. Dec. 534, and note. Relief against a contract entered into through mistake may be granted when the parties can be replaced in their former position: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816, and note. When a creditor holds a policy of insurance on the life of his debtor in a large amount, and ten days after his death, and while the fact is still unknown to either the insurer or the creditor, surrenders his policy and accepts a smaller paid-up policy in its place, all parties believing that the insured is still alive, the creditor, upon discovering the facts, is entitled to have the original policy revived, on the ground that the contract of exchange was entered into under a mutual mistake of fact: *Riegel v. American L. Ins. Co.*, 140 Pa. St. 193; 23 Am. St. Rep. 225, and note. A contract will be reformed in equity on proof of a mutual mistake of the parties: *Fehlberg v. Cosine*, 16 R. L. 162; see extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

McELLAGOTT v. RANDOLPH.

[61 CONNECTICUT, 187.]

DEATH, DAMAGES ALLOWABLE FOR CAUSING. — In an action for negligence, whereby the death of plaintiff's intestate was caused, damages based upon the value of the life of the decedent to his wife and children should not be assessed.

MASTER AND SERVANT. — IT IS A MASTER'S DUTY TO EXERCISE REASONABLE CARE to procure for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and competent persons as his co-laborers, and the performance of these duties cannot be avoided by the simple giving of an order by which their execution is intrusted to another.

MASTER AND SERVANT — VICE-PRINCIPAL, LIABILITY FOR NEGLIGENCE OF. — A master cannot, by delegating the performance of his duties to another, relieve himself from responsibility for injuries resulting from the failure of the agent or vice-principal to exercise that degree of care which would have relieved the principal from liability had he undertaken the performance of his duties in person.

MASTER AND SERVANT — VICE-PRINCIPAL'S ABANDONMENT OF HIS DUTIES.

— The selection by a master of a competent person to superintend the execution of work will not deprive a servant of the right to recover of the principal for injuries received in doing such work, and occasioned by such superintendent's absenting himself and leaving the selection of the means and manner of attempting to perform the work in the hands of inexperienced and incompetent men.

MASTER AND SERVANT. — ONE IS A VICE-PRINCIPAL, AND NOT A FELLOW-SERVANT, when he is selected to superintend work which is dangerous without such supervision and without the selection of proper appliances, and the persons whom he is to superintend have not, without his supervision, the mechanical knowledge requisite for the selection of such materials and the safe performance of the work.

MASTER AND SERVANT. — MASTER'S RESPONSIBILITY in case of injury to his servant is to be determined, not by the rank or grade of the servant through whose neglect the injury was suffered, but by the character of the particular act or the occasion to which the injury was attributable.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — The fact that an employee was advised to go home, but, disregarding the advice, continued at work, and while working in the service of his master, was killed through the neglect of a vice-principal, does not charge the servant with contributory negligence, nor relieve the master from liability, though had the servant gone home, he would not have been exposed to danger.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — Where two positions are apparently equally safe, a servant is not chargeable with contributory negligence because he chooses the one which proves to be unsafe and is there injured, through the negligence of a vice-principal.

J. O'Neill, for the plaintiff.

S. W. Kellogg and D. W. Webster, for the defendants.

PRENTICE, J. The plaintiff's intestate was in the employ of the defendants, and while so employed was accidentally killed. He left a widow, three minor children, and one child *en ventre sa mere*. The complaint alleges that the intestate's death was caused by the defendants' negligence, and claims damages, laid at five thousand dollars. The defendants having suffered a default, the damages were assessed by the court, and one thousand dollars awarded. Both parties appeal.

The plaintiff assigns five reasons of appeal. These reasons, however, are in substance one, namely, that the court failed to assess any damages based upon the pecuniary value of the life of the deceased to his wife and children. The plaintiff's claim is, that the history of legislation in this state, beginning with the act of 1848, providing for the revival of certain actions of tort, and embracing the act of 1853 fixing a maximum and minimum of recovery where death should result from railway accidents, and providing for its distribution, shows that our statutes contemplate and authorize two

independent cumulative recoveries,—one for the pain and suffering of the deceased up to the moment of his death, and another for the subsequent loss to the surviving widow, children, and heirs. Former adjudications of this court render discussion of this claim unnecessary. The precise question here raised was in all its aspects considered and decided in the case of *Goodsell v. Hartford and New Haven R. R. Co.*, 33 Conn. 51. The opinion of the court in that case, in clear and forcible language, discusses the claims urged upon us, explains the objects and relations of the acts of 1848 and 1853, and in plainest terms lays down the rule for the assessment of damages in cases of personal injuries resulting in death. The rule thus laid down the court below applied in the case at bar.

The defendants' reasons of appeal are, in substance, that the facts found disclose that they were not guilty of negligence, and that the plaintiff's intestate was guilty of contributory negligence.

The deceased was one of two hundred factory operatives employed by the defendants. In the wheel-pit of the defendants' factory was a large gear-wheel, weighing upwards of twelve tons, which it was desired to remove for the substitution of another of an improved pattern. The work was one of some difficulty, and required the exercise of mechanical skill. It was by the defendants intrusted to one Dunning, who was the master-mechanic of the factory and a capable machinist. For the performance of the work he selected from the defendants' hands ten men, the best adapted for the work. These men were not skilled or trained in mechanical work. With competent instructions, oversight, and direction, however, they were competent to perform the work. Otherwise they were incompetent. Among these ten men was McElligott, who was chosen because he had requested that extra employment be given him whenever practicable, and because he had once assisted in a similar operation. In order that the removal of the wheel might interfere as little as possible with the operation of the factory, the work was performed during the night. The wheel was made up of ten sections. These sections were removed independently. About midnight, some of the sections having been removed, Dunning was induced by the entreaties of his little boy, who was present, to go home. The work grew more difficult as the removal progressed. By the removal of the fifth section, Dunning having then left, the wheel was put out of gear with the gear-wheel on the engine-shaft, and it be-

came necessary to support it. Dunning had foreseen this contingency, and had given instructions for the use of a certain wooden horse for the suspension of a set of blocks and falls for the purpose of supporting and holding in place the remaining sections of the wheel when it should become out of gear. After Dunning's departure, one Johnson was regarded as the foreman of the work. He, like his fellows, was without mechanical training or skill. When support of the wheel became necessary, the horse was placed in position, and the block and falls attached thereto. One of the workmen went and got a rope from the defendants' stock, attached it to the shaft of the wheel, and fastened the block and falls to it. By means of this apparatus the wheel was supported. It was also blocked up underneath in some way by one of the workmen. There were sufficient and suitable ropes, supports, props, and other appliances, together with others which were insufficient and unsuitable, upon the premises near the point of work. Dunning gave no instructions as to which of these, save the wooden horse above referred to, should be used, or how they should be selected. Those used were picked out by one and another workman as wanted. The rope used to support the wheel was got by one Phalen, and it was by him adjusted into position. Neither the rope nor the method of its adjustment was examined by any one else. Phalen likewise put the blocking into position. This was also done without supervision or examination. This being done, the work progressed safely until during the removal of the eighth section, when the rope and horse gave way, and the wheel fell into the pit. The deceased was at the time sitting upon the hub of the wheel, engaged in his work, and was, by the accident, cast down to his death. The cause of the accident was, in the language of the finding, "the inadequacy of the support, the rope being insufficient in size and strength for the strain upon it, and the support by which the wheel was blocked being also inadequate, improperly placed to sustain the weight to which it was adapted, and the whole arrangement and device was in the highest degree unsuitable and insecure, in view of the weight to be supported and the extreme hazard involved." Upon these facts, the defendants claim that they had performed their whole duty in the premises in that they had provided competent and suitable persons to oversee, direct, and do the work, and also suitable and sufficient appliances, tools, and materials therefor.

The rule of duty of master to servant is well settled in this

state. It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers. It is equally well settled that performance of these duties cannot be effected by the simple giving of an order, — by their execution being intrusted to another. The designation of an agent, however fit and competent that agent may be, for the execution of the master's duties, does not fill out the sum of the master's obligation, nor serve to relieve the master from further responsibility. Until the agent thus selected and empowered in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance. He may, at his option, perform in person or delegate performance to another. In either case, reasonable care must be exercised in the doing of the act required to be done by the master: *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; 47 Am. Rep. 653; *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Hough v. Texas etc. R'y Co.*, 100 U. S. 213; *Davis v. Central Vermont R. R. Co.*, 55 Vt. 84; 45 Am. Rep. 590; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Harper v. Indianapolis etc. R. R. Co.*, 47 Mo. 567; 4 Am. Rep. 353; *Brodeur v. Valley Falls Co.*, 16 R. I. 448; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661.

Wood, in his work on master and servant (p. 871), states the rule as follows: "The rule established and supported by the better class of cases is, that whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman, he stands in the place of the master."

Examining the facts of the case with reference to these legal principles, we observe that while it is true that the defendants intrusted the execution of the work upon which McElligott was engaged to a competent superintendent, provided him, McElligott, with co-laborers who were fit and competent when under competent supervision, and had upon the premises appliances and apparatus suitable for the work, it is equally true that, during the progress of much of the work,

and at the time of, and for a considerable time prior to, the accident, the work was wholly without competent superintendence; that there was even no one present who was possessed of mechanical skill; that the provision of suitable appliances was simply in the sense of there being such near at hand, mingled with others unsuitable; that those appliances which were in fact chosen and set apart for the work were mainly selected by unskilled factory-hands, at random, and without instructions, oversight, or examination, and that they were adjusted by like laborers, with the like absence of instructions, oversight, and examination.

The accident happened, in part, because a certain wooden horse, or support, was inadequate. Dunning, the superintendent, selected this particular appliance, and directed its use. The wheel fell, in fact, because a certain rope was too small and inadequate. The defendants had done nothing to provide a suitable rope, except to have upon the premises a stock of various kinds of rope, some suited to one purpose, and some to another, and to allow any chance, inexperienced laborer to select for each special use the one which his impulse dictated. Just here we touch upon the most significant and potent factor in the situation, namely, the entire absence of competent superintendence during all the later stages of the work. After Dunning's departure, about midnight, there was no one either over or connected with the gang of men employed who possessed any mechanical knowledge or skill. Had Dunning remained present, properly executing his master's duty intrusted to him, there would have been no such unintelligent, haphazard selection of apparatus, no such inadequate and unsuitable devices of support, as were instrumental in McElligott's death. Moreover, Dunning's departure in an instant transformed McElligott and his fellows from fit into unfit co-laborers. The finding states explicitly that these men were incompetent for the work assigned them without suitable supervision. During the hours, therefore, which succeeded Dunning's return home, McElligott was surrounded only by incompetent fellow-workmen, and he went down to his death in consequence of constructions and mechanical adjustments made by his fellow-servants, employed by the defendants to do, in company with him, what they were unfit to do. Plainly, therefore, the defendant's duties as masters of the deceased were not performed.

The defendants' counsel, in their brief, urge that as their clients had intrusted the execution of the work to a competent

agent, they were relieved from further responsibility. This position, as we have already indicated, is not well taken. They also appeal to the familiar rule that the master is not liable for injuries to one servant through the negligence of his fellow-servant, and argue, with much vigor and with an imposing array of authorities, that Dunning was a fellow-servant of the deceased and not a vice-principal of the defendants. The error in this line of reasoning lies in an attempt to classify Dunning's position by the grade or general scope of the duties of his employment. The error is one to which, it must be confessed, that many decisions have given countenance. But the better modern authorities have united in pointing out the error and the difficulties incident to it, and in establishing the true rule. This rule makes the character of the act, or omission wherein the negligence exists, the test of the master's responsibility therefor. One may in some of his acts be executing his master's duty towards the master's servants, while in others of his acts he is simply a fellow-servant, of the same or of a higher or lower grade. The master's responsibility or non-responsibility, in case of injury, is determined, not by the rank or grade of the offending servant, but by the character of the particular act or omission to which the injury is attributable: 7 Am. & Eng. Ency. of Law, secs. 824, 834; Wood on Master and Servant, p. 871, sec. 438; *Davis v. Central Vermont R. R. Co.*, 55 Vt. 84; 45 Am. Rep. 590; and the other cases last cited.

There only remains to consider the defendants' claim that the facts disclose that McElligott's own negligence contributed to his death. The finding shows that as McElligott was leaving the factory upon the evening in question he was met by the factory superintendent, who, after learning that McElligott was going to work upon the removal of the wheel, said to him: "I guess I had better see about this, because your work is such that we want you to-morrow. Do not work later than ten o'clock. I have no objection to your working until then, but after that you ought to go home and get rested for to-morrow, because we can't spare you." Dunning, before his departure, also said to McElligott: "Pat, you had better go home about twelve o'clock. They will need your work to-morrow." It also appears that a plank extended across the wheel-pit in such manner that McElligott might have safely stood upon it in the performance of the act he was engaged in

at the moment of the accident. These are the facts relied upon as showing contributory negligence.

McElligott's failure to go home clearly cannot bar recovery. Whatever the directions to him were, he in fact remained, as the finding expressly states, in the service of the defendants up to the moment of his death. His remaining did not absolve his employers from their duty to him. The relation of master and servant continued with all that that relation implies. On the other hand, McElligott's remaining can in no true sense be regarded as a contributing cause of his death. It is true that if he had gone home at midnight he would not have been killed. It is equally true that if he had not gone to the work at all he would have escaped the catastrophe. His going to the work was as much the occasion of his death as his remaining at it. Neither were contributing causes in the legal sense. They were simply conditions which made his injuries possible: *Smithwick v. Hall and Upson Co.*, 59 Conn. 263; 21 Am. St. Rep. 104.

McElligott, at the time of the accident, was sitting upon the hub of the wheel, engaged in his work. His position was a convenient one for him. It was apparently, to his observation at least, a safe one also. That, as between two apparently safe positions, he failed to choose the one which proved to be safe in fact certainly cannot be ascribed to him as negligence.

There was no error in the judgment complained of.

NEGLIGENCE CAUSING DEATH — DAMAGES FOR. — The law will imply substantial pecuniary loss in some amount to a wife and child from the death of a husband and father, who was, at the time, presumably receiving wages, and was therefore able to support those dependent upon him: *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883, and note; extended note to *Louisville etc. R'y Co. v. Goodykoontz*, 12 Am. St. Rep. 380; *Hudson v. Houser*, 123 Ind. 309.

MASTER AND SERVANT — SAFE APPLIANCES — DELEGATION OF DUTY TO FURNISH. — It is the duty of a master to furnish for a servant safe and suitable appliances in the performance of his work, and he cannot escape liability for a failure to do so by intrusting the performance of such duty to another person: *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note. A master is guilty of negligence if he fails to supply his servant a reasonably safe place in which to work: *Nadas v. White River Lumber Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note.

MASTER AND SERVANT — MASTER'S LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL. — A master is liable for the negligence of a superintendent of a saw-mill, who had charge thereof, in putting a servant to work without giving him proper instructions: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep.

138, and note; see extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455.

MASTER AND SERVANT — WHO ARE VICE-PRINCIPALS. — Mere grades of rank of servants of a common master engaged in a common employment will not destroy the relation of fellow-servants; yet where one is authorized to employ and discharge servants working under his direction, his negligence is that of the master: *Nix v. Texas Pac. R'y Co.*, 82 Tex. 473; 27 Am. St. Rep. 897, and note, in which the cases are collected giving the distinction between vice-principals and fellow-servants: *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note with cases collected defining vice-principals.

MASTER AND SERVANT — MASTER'S LIABILITY, HOW DETERMINED. — The character of the negligence from which damage to a co-employee results, and not the superior rank of the negligent servant, determines the responsibility of the master: *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621, and note.

HARTFORD ICE CO. v. GREENWOODS COMPANY.

[61 CONNECTICUT, 166.]

TROVER — CONVERSION. — UNQUALIFIED REFUSAL TO DELIVER PERSONAL PROPERTY to one entitled to its possession, based upon an assertion of title on the part of the person so refusing, is a conversion thereof, though at the time a delivery, owing to the situation of the property, was impossible.

J. B. Foster and C. E. Perkins, for the appellant.

L. E. Stanton and H. E. Taintor, for the appellee.

FENN, J. This is a civil action in the nature of trover, in which, in the concise manner, it is stated in the complaint "that, on August 20, 1890, the defendant had certain ice in its possession belonging to the plaintiff," with an averment of demand, refusal, and conversion. The answer was double, — a denial, and loss of title by the plaintiff through neglect to take possession and remove within a reasonable or agreed time. The facts found were, in substance, as follows: The plaintiff, in August, 1889, purchased of the defendant the ice, — two thousand six hundred tons, — in one compartment of an ice-house owned by the defendant at New Hartford, and paid for the same. There was no agreement as to when the ice was to be removed by the plaintiff. The defendant, however, knew that the plaintiff would not desire to remove the same faster than the demands of its business of ice dealers, at retail and otherwise, in Hartford, required. The plaintiff did so remove the ice, from time to time, until March, 1890, when about five hundred tons still remained.

On December 27, 1889, the defendant wrote the plaintiff, saying that it was about time to cut another crop, and asking how soon the plaintiff could give it the use of its ice-house. The plaintiff's agent soon after saw the agent of the defendant, and said that the defendant could put its new ice above the old ice, if it had occasion. No further notice or request as to the removal of the ice was ever made by the defendant.

Shortly before March, 1890, the defendant did cover the plaintiff's ice with several feet of new ice. The plaintiff, on March 10, 1890, wrote the defendant, saying: "As there was no understanding as to when we should take the ice away, we suppose that it is still ours, and shall claim it whenever the same can be got at. Is that your understanding in covering it up?" To which the defendant replied, March 11, 1890, saying its understanding was, that the plaintiff had the lease of the ice-house for the season, or until the defendant commenced harvesting ice. The title to the ice so covered thus became a subject of controversy between the parties from that time until suit was commenced, on September 17, 1890, each party claiming the ice as its property. About August 20, 1890, the plaintiff's attorney went to New Hartford, and made a formal demand upon the defendant for the ice. The defendant then and there asserted its title to the ice, and declined and refused to deliver or agree to deliver it to the plaintiff. The defendant never retracted its position, but the next day, after consulting counsel, wrote the plaintiff, saying: "We have come to the conclusion that our part of the contract has been fully performed." The court below further found "that the plaintiff did not unreasonably delay the removal of the ice, but at all times removed the same as fast as it could use it in its business. The defendant was in no way damaged by the non-removal of the plaintiff's ice, as it did not gather ice enough to fill its ice-house above the space occupied by the ice of the plaintiff." It was agreed that the remaining ice was worth four dollars per ton at and after August 20, 1890, and thereafter until the defendant sold the ice, which it did shortly after suit was brought.

The court rendered judgment for the plaintiff for two thousand dollars damages, but as the ice, being covered, would not have been available without removal of the defendant's ice, about November 1, 1890, interest was allowed only from the latter date. The defendant appealed. Although it was somewhat argued that the ice in question was not, in August,

1890, the property of the plaintiff, yet this claim was not much pressed, and in view of the character of the finding, we may dismiss it, and confine our consideration to the chief and sole remaining contention of the defendant, "that there was no evidence of the conversion of the ice before the suit was brought, because, as the defendant says, it appears that the defendant could not deliver the property when demand was made, as it was then covered by fresh ice; and that a refusal to do the impossible is not evidence of a conversion; and that it made no difference that refusal, under such circumstances, was coupled with an assertion of title and a denial of the plaintiff's right."

Now, in order to vindicate this claim, it should first appear that it is not in conflict with previous decisions in this state, especially the cases of *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121, and *Clark v. Hale*, 34 Conn. 398, in the former of which, being an action of trover, it was held that a refusal to deliver goods upon a demand is *prima facie* evidence of a conversion, and that when an officer entitled to a lien, on demand of the goods, made an unqualified refusal, without any claim of lien, he could not afterwards set up such lien as a defense to an action of trover for the goods; and in the latter of which it is held that where a person having the chattel of another in his possession, on demand by the owner, absolutely refuses to deliver it, it is sufficient evidence of conversion, in the absence of rebutting proof, although the chattel was at a distance from the place of demand and could not have been at once delivered, and where the court, in its opinion, uses this significant language: "The absence of the wagon was not the cause of the refusal."

Let us note, in passing, that the fact that the ice was covered was not the cause why this defendant not merely refused to deliver it, but went further, and asserted title in itself, and the effect of supporting the present claim of the defendant would be to enable it to turn a refusal, squarely made, in the nature of joining issue upon the question of title (when that issue was judicially decided against it, though in the mean time, in the further assertion of such title, it had sold the property), into something, in effect, like a dilatory plea, to defeat the present action as merely premature, and to cast the plaintiff in a bill of costs. We think the language of the court in *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121, relevant. "But here, again, the defendant is met, and we think conclu-

sively, with the fact that he set up no such claim at the time, but made an unqualified refusal. Had this refusal been qualified by this claim of lien, the plaintiffs might have met it and obviated it, but the defendant keeps it a secret in his own breast, and now seeks to defeat the plaintiffs' action by a claim before unknown." Indeed, in the present case, the defendant's action is rendered emphatic by the fact that the plaintiff was seeking, in the only way that seemed possible, to learn from the defendant whether its act, in covering the ice in question, was done merely to store its own ice, to which the plaintiff did not object, or as an assertion of title, and, in effect, a conversion of the plaintiff's property to its own use, and the defendant's conduct clearly indicates which was the real purpose and design; that the defendant by the act ceased to hold the ice as the property of the plaintiff, and thereafter held and treated it, absolutely and exclusively, as its own. Indeed, had the sale of the ice, in that condition, and not available for immediate delivery, been made just before instead of just after the suit, it is difficult to see how it could have made the case against the defendant stronger, or the conversion by the defendant and the ouster of the plaintiff from its rights more pronounced.

It will be manifest from what we have said that we regard the defendant's contention as counter to the doctrines of the case cited; but the cases which the defendant itself cites in its brief, and upon which it relies, are also, as it seems to us, opposed to such contention. Those cases are *Williamson v. Russell*, 39 Conn. 406; *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Stackpole v. Eastern R. R. Co.*, 62 N. H. 493; *Kelsey v. Griswold*, 6 Barb. 443; *Bowman v. Eaton*, 24 Barb. 528; *Whitney v. Slauson*, 30 Barb. 276.

In *Williamson v. Russell*, 39 Conn. 406, although the defendant had bought and paid for the property, he had never had possession of it, being in the same situation as the vendee of the defendant would have been, had demand been made upon him before he took possession. The court, by Seymour, J., says: "Under these circumstances, we cannot say, as a matter of law, that the superior court erred in finding that there was no conversion of the property of the defendant to his own use. If the property was not, at the time of the demand, subject to the defendant's order, or under his control, his refusal to deliver it is no conversion, and it does not appear but that his refusal was based upon those grounds. If, however, the bags

were under the defendant's control, it certainly was inequitable for him to detain them, under the circumstances disclosed in the motion." And again, referring to another question: "If the conversion had been found, this question might have arisen"; clearly showing that while the court did not feel warranted in saying that, as a matter of law, the court below erred in finding there was no conversion, it would not, under the facts found, have done what we are asked to do, under the infinitely more conclusive ones of the present case, have found that the court erred, as a matter of law, in holding there was one.

In *Gilmore v. Newton*, 9 Allen, 171, 85 Am. Dec. 749, the defendant bought a horse, in good faith, from one who had no right to sell him, and subsequently exercised dominion over him by letting him to another person, who ran away with him, and neither the person nor the horse was afterwards heard of. The defendant supposed his title to the horse to be perfect, and no demand was made by the plaintiff before commencing his action. A verdict for the plaintiff was sustained. The court, Metcalf, J., says: "According to Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion." This, it seems to us, is precisely what the defendant did in this case. And this, also, is precisely what the defendants in the case of *Stackpole v. Eastern R. R. Co.*, 62 N. H. 493, did not do. That was a case where the plaintiff purchased of the defendants certain buildings, including foundation stones and underlying materials, stipulating to remove them within a time specified, and with full notice of the defendants' purpose to proceed at once to erect a freight-house upon the site. The plaintiff failed to remove some foundation stones and bricks within the time, and the defendants covered them in filling the cellar, as a necessary step in the construction of the freight-house. A charge to the jury that this did not constitute conversion was sustained.

The cases in Barbour all largely turn upon questions as to the appropriate forms of action, and nothing therein conflicts with the conclusions which we have reached.

It is, however, the urgent contention of the defendant that it is good sense, as well as good law, to say that if a person cannot deliver property on demand, his refusal to do what he cannot do is not a conversion." Undoubtedly; but it is equally good sense and good law that if a person has in his possession property of another, which he voluntarily puts it out of his

power to immediately deliver on demand, he ought not to make such inability his pretext and defense for absolutely refusing ever to deliver at all. Nor ought such inability to surrender to the owner to justify his assumption of title in himself. If, in such cases, demand and refusal becomes inoperative to raise an inference of conversion, it is because, as the court says in *Gilmore v. Newton*, 9 Allen, 171, 85 Am. Dec. 749, the assumption is conversion itself.

The defendant further says that it was unfair on the part of the plaintiff to make demand and bring a suit when it knew that the defendant could not comply with the demand, and that it is evading the real question, whether demand and refusal is evidence when the defendant cannot deliver, to say that the defendant might have said that the ice was covered, but when uncovered the plaintiff might take it.

We have no desire, certainly, to evade the real question. Nor do we believe any of the courts had, whose utterances we have cited. But we think that the defendant, whose conduct in asserting title in itself to the property of another compelled the plaintiff's demand, and who neither met that demand by an admission of the plaintiff's ultimate right (which, as the defendant knew, was all the plaintiff sought), or even by a bare refusal, but who deliberately threw down the gauntlet by the assertion of its own title, is hardly in a condition to dignify its defeat, upon its own chosen ground, by the cry of "unfair."

The defendant says, further, that there is no difference between the legal positions of persons who do not have property and of those who are unable to deliver it. Clearly, no comparison can be made between them on the question of conversion, for where there is no trover there can be no conversion. If the defendant never had actual or constructive possession of the property of another, that ends the matter. The further element is never reached.

There is no error in the judgment complained of.

TROVER — CONVERSION — WHAT CONSTITUTES. — Conversion, to sustain trover, consists in a withholding of the possession of plaintiff's property under a claim of title inconsistent with the title of the owner: *Bolling v. Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789, and extended note; extended note to *Hale v. Ames*, 15 Am. Dec. 151. If the defendant took plaintiff's property, and refused to return it on demand, there is a conversion: *Arzaga v. Villalba*, 85 Cal. 191. A refusal to deliver property until an illegal demand for storage is paid is evidence of conversion: *Galvin v. Galvin Brass etc. Works*, 81 Mich. 16; see *Gaynor v. Blewitt*, 69 Wis. 582.

MAYHEW v. MAYHEW.

[61 CONNECTICUT, 233.]

DIVORCE ON THE GROUND OF INTOLERABLE CRUELTY. — Sexual intercourse demanded and persisted in by a husband in a rash, rough, and unreasonable manner, when he knows that the condition of his wife is such that it will inflict suffering and injury upon her, and that she cannot properly and safely accede to his wishes, renders him guilty of such intolerable cruelty as entitles her to a divorce.

HUSBAND AND WIFE — MARITAL DUTIES. — While it is the duty of the wife to submit to sexual intercourse with her husband, it is also his duty to forbear at her reasonable request, and when she cannot properly and safely accede to his wishes.

SUIT and judgment for divorce by a wife from her husband.

L. D. Brewster and S. Tweedy, for the appellant.

R. E. De Forest and W. J. Beecher, for the respondent.

ANDREWS, C. J. The plaintiff brought her complaint praying for a divorce from her husband on the ground of intolerable cruelty. The superior court heard the case, made a finding of facts, and granted the divorce. The defendant brings the case before this court, and alleges as his reason that the facts found do not show intolerable cruelty within the meaning of that expression as construed in the case of *Shaw v. Shaw*, 17 Conn. 189. The acts, however, which are set forth in the finding are not exclusively such acts as are the subject of the discussion in that case. Other acts are found to have been committed by the defendant of which intolerable cruelty might be pretty safely affirmed. Besides, the acts found in this case which are of the same nature as those complained of in *Shaw v. Shaw*, 17 Conn. 189, are found to have been committed by the defendant with knowledge of their probable effect on the plaintiff. It is said in that case that such acts might constitute intolerable cruelty if the husband had reasonable grounds to apprehend serious injury to the health of the wife therefrom. In the present case, the finding is, that the acts "were attended by danger and fear, and injury to the plaintiff and to her health, and were rashly and roughly and unreasonably done; and each of them when the defendant knew the condition of the plaintiff and the suffering and injury it would be likely to inflict on her, and her inability to safely and properly accede to his wishes. And I find," adds the court, "his conduct in this respect brutal and unendurable, and that the plaintiff could not safely cohabit

with him longer." This finding brings the case clearly within the doctrine of the case cited.

What may or may not constitute intolerable cruelty by a husband towards his wife in the exercise of his marital rights is a difficult and delicate question. Such acts as are usually meant by that term are not ordinarily dangerous or cruel. But sometimes they may be both dangerous and cruel. Marital rights exist on the part of the wife as distinctly as on the part of the husband: *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258. Correlative to marital rights are marital duties. The term implies a two-sided obligation. In respect to such acts as are here in question, it includes the duty of forbearance on the part of the husband at the reasonable request of the wife, as well as the duty of submission on the part of the wife at the reasonable request of the husband. Any decision of what constitutes intolerable cruelty in these matters that should leave out of consideration the duty of the husband and look only to the duty of the wife would be manifestly erroneous. There is no error in the judgment of the superior court.

MARRIAGE AND DIVORCE — EXTREME CRUELTY — EXCESSIVE SEXUAL INTERCOURSE. — The subjecting of a wife by her husband to excessive sexual intercourse is a ground for divorce: *Melvin v. Melvin*, 58 N. H. 569; 42 Am. Rep. 605; note to *Morris v. Morris*, 73 Am. Dec. 630. See also note to *Poor v. Poor*, 29 Am. Dec. 674, in which the question of cruelty as a ground for the annulment of marriage is discussed.

METROPOLITAN LIFE INSURANCE CO. v. FULLER

[61 CONNECTICUT, 252.]

INJUNCTION WILL NOT ISSUE IN ONE STATE TO ENJOIN THE PROSECUTION OF SUITS IN ANOTHER against parties there resident, when there is nothing to show that such prosecution would not be lawful and successful, or that it would cause any unusual expense or inconvenience to the parties sued.

ASSIGNMENT OF RIGHT TO BRING ACTION TO SET ASIDE SETTLEMENTS. — If a life insurance corporation represents to holders of policies under the reserve dividend plan that specific sums are due to them, and they, believing such representations to be true, accept the sums so paid, and give receipts therefor purporting to be in full payment, when in fact a much greater sum was due to each of them, each has a claim against the insurance company capable of assignment, and may therefore vest in his assignee the right to maintain an action to set aside such receipts and to recover the residue due under the policy.

INJUNCTION AGAINST BRINGING ACTIONS ON CLAIMS ASSIGNED to him will not issue against one to whom numerous holders of policies of life insurance, issued on the reserve dividend plan, have assigned their respective rights to recover the residue claimed to be due on their policies, they having, in reliance on the statements of the insurer, accepted sums less than those actually due them, and given receipts in full.

CHAMPERTY. — A contract whereby one person agrees to prosecute actions on behalf of others for a share of the proceeds of such actions is not void for champerty, when it is not opposed to public policy, and a contract is not against public policy by which one person agrees to bring suits to recover balances claimed to be due other persons on life insurance policies, issued to them on the reserve dividend plan, such persons having accepted payment of less sums than were due them and given receipts in full, relying on the statement of the insurer that the sums so paid were all that were due them.

ASSIGNEE OF CAUSES OF ACTION WHO AGREES, in consideration of the assignments, at his own expense, to bring actions thereon, and to pay the assignors one half of the net proceeds of such actions, but reserves the right to reassign the claims if at any time he deems it advisable to give up the attempt to prosecute them, obtains a beneficial interest in such causes of action, and becomes the equitable and *bona fide* holder thereof.

J. Halsey, H. Stoddard, and H. Fiske, for the plaintiff.

J. W. Alling, L. A. Fuller, and E. P. Arvine, for the defendants.

FENN, J. For a proper understanding of this case a statement will be necessary. The plaintiff, a New York corporation, claims an injunction restraining each of the defendants from prosecuting, in any court in this state or elsewhere, any claim growing out of certain alleged assignments to the defendants of claims against the plaintiff; from obtaining other like assignments; from transferring any interest claimed by the defendants by virtue of such assignments; and a judgment that the defendants are not, as to the plaintiff, the lawful assignees of any claim upon the plaintiff by virtue of said pretended assignments. Upon its application, a temporary injunction was issued, which remains in force. The substance of the material portions of the finding made by the court below, which reserved the case, is, that the plaintiff, in the prosecution of its business of life insurance, during the years 1872, 1873, and 1874, entered into separate written contracts, of a similar nature, to insure the lives of certain persons named in the pleadings, and of many others. Most of these contracts, or policies of insurance, ran for ten years, but a few were for longer terms. In all cases, however, at the end of ten years, there was due and payable to the insured a sum of money un-

der what is called the "Reserve Dividend Plan." At the end of this period of ten years from the date of the respective policies, the plaintiff, of its own accord, sent to each of the policy-holders insured under this form of policies during the years named circulars in which a sum was stated as the amount due to such policy-holder. No information was given to policy-holders as to the amounts due, except by these circulars. Upon receipt of the circulars, the policy-holders named in the pleadings, without other knowledge, inquiry, or investigation, and upon the supposition and belief that such statements were correct, filled in each case a blank left in the circular for such purpose, with the option to "surrender the policy for its present cash value," as stated in the circular, and signed their respective names thereto, and returned the circular, so signed, to the plaintiff. The plaintiff thereupon sent its checks for such stated sum to the policy-holders, who, on receipt thereof, delivered up their policies, and each signed and delivered to the plaintiff a receipt, previously prepared by the plaintiff, by filling in a blank form used for that purpose, stating the sum received to be "in full payment, settlement, and discharge of all claims and dividends, surrender value or otherwise, under and by virtue of policy No. —." All of said circulars, policies, and receipts have ever since been in the possession of the plaintiff, between whom and the policy-holders no further communication ever passed.

The defendant Austin B. Fuller resides in New Haven. He had been the insured, and his wife, the other defendant, the assured, under a similar policy, which had been litigated, resulting in the recovery of a very much larger sum than that stated by the plaintiff in its circular to be due. After the close of this litigation, and in the year 1889, he solicited and obtained assignments from the policy-holders named in the pleadings. He believed their cases to be like his own, and that there was more due under their policies. The assignments, executed by the assignors under seal, stated that such assignors, "for one dollar and other good considerations, . . . do hereby sell, set over, transfer, and assign unto Harriet A. Fuller of New Haven, Connecticut, all the claims, demands, and causes of action which we, or either of us, have or may have against the Metropolitan Life Insurance Company of New York." No money was in fact paid, the real consideration and contract being expressed in a writing signed by said Austin B. Fuller and delivered to each of the assignors, in which is

the following statement: "Said assignment is made upon the following understanding, namely: Said A. B. Fuller is to employ attorneys and counsel for the purpose of prosecuting said claim in the name of said Fuller, and without any liability on the part of said [assignors] to pay the expense or any part thereof. If no recovery is had, the said [assignors] are not to make any claim against said Fullers, or either of them. But if the suit results in a judgment and recovery for the plaintiffs, then said A. B. Fuller will pay to [the assignors] one half of such sum as remains to him after paying lawyers and other expenses. If said Fullers find it advisable to give up the attempt to prosecute the claim, then the right is reserved to reassign the said claim to the former holder, whereupon their liability under this agreement will cease."

These assignments were made to the defendant Harriet A. Fuller, with her authority and consent, her husband transacting the business. She had no pecuniary interest in any of the assignments, but gave general authority to her husband to do what he pleased in respect thereto, in the hope that he, and through him his brother, who was a lawyer in New York, who had conducted the former litigation, would make some money.

The plaintiff having in the complaint alleged that the policies had become of no binding effect, but had been fully discharged and satisfied, the defendants, to the first defense of general denial, added a second, alleging that the surrender of the policies and the receipts were fraudulently obtained by the plaintiff, and that the assignments to the defendants were made for the purpose of enforcing and collecting the claims of the several assignors against the plaintiff, by suits to be brought in court in the state of New York, — the state in which the plaintiff corporation was organized, and where it is located, and in which such assignments and contracts were lawful. The defendants also filed forty-one counterclaims, each of which is based on one of said assigned claims, and they asked, by way of equitable relief, a cancellation of the receipts given by their assignors to the plaintiff, an account, and judgment for the amount found due by the account, and one hundred thousand dollars damages. They also asked the answer to numerous interrogatories, and filed a motion for the production of papers and for disclosure.

Upon motion of the plaintiff, and against the earnest protest of the defendants, the court directed "that the issues made by the first defense be heard and determined before any other

issue in said cause is tried." The motions aforesaid, for answer, disclosure, and production, were denied as not relevant to the issue presented by the first defense, and the case, as presented to us upon reservation, was tried solely upon such issue.

Upon the facts found, it is not possible for us to see how, under any view which may be taken, the plaintiff can be held entitled to the equitable relief claimed. Surely we ought not to be asked to assume those allegations of the complaint to be true which the plaintiff did not prove, and the defendants were not permitted so disprove. If any presumption of full payment would naturally and ordinarily arise from the surrender of policies and the giving of receipts in full, such presumption ought not to be invoked against a party who is forbidden to rebut it, or in favor of one who insists that the assignors' right to sue the plaintiff "is a question wholly irrelevant to our cause." The plaintiff explicitly says this "action is founded upon the theory that the defendants had no right to sue the plaintiff in respect to the policies of insurance, even if the assignors might have had some right in that respect." For manifest reasons, especial emphasis ought not to be placed on the word "some," in the foregoing quotation, and the word "full" would have better harmonized with the claim of the entire irrelevancy of the assignors' right. But if we adopt the plaintiff's theory, it is fatal to the argument which follows; for upon such theory the remedy at law would be as complete and beneficial as the relief in equity. The plaintiff says in the brief: "The plaintiff can doubtless defend the suits *seriatim* in all jurisdictions, but every action at law by these assignees involves, upon their own theory and principles, the expensive and troublesome discovery which is sought under the second defense and counterclaim. This consideration, that the claim of the defendants necessarily involves this great trouble and expense, seems to preclude these defendants from insisting that the plaintiff has no standing in a court of equity to invoke its jurisdiction. When, upon the very claim of the defendants, numerous suits are involved, and great and unnecessary expense is inflicted upon the other side, such persons have no standing in a court of equity to object to its jurisdiction." Now, as to the foregoing statement, it seems manifest, — 1. That the object and natural effect of these assignments was, not to create, but to prevent, a multiplicity of suits, *seriatim*, by such assignors in all jurisdictions; that instead, there should be but a single suit by the assignees, in

one (and that the plaintiff's home) jurisdiction. Certainly there is nothing to negative such an inference, and the defendants offered, both by special defense and under the general denial, to prove such actual intention, both on the part of the assignors and of the defendants, and were precluded. Waiving, then, the question whether the defendants' action made the suits more likely to be brought at all, the proposed manner of bringing them would be the opposite of what the plaintiff has claimed. 2. Having started to test the plaintiff's theory, it seems best to pursue that, rather than at once determine what would follow from that of the defendants. And on the plaintiff's theory, certainly there could be no such "expensive and troublesome discovery," since, if the plaintiff's contention is right here, it must be (and can only be so here, because it would be) right there also. As the assignees would have no right any way, the case would break down at the start, and such discovery would be "wholly irrelevant to the cause." 3. Equitable relief, it may be added, is usually granted rather upon the consideration that the plaintiff has a standing to insist, than that the defendant has not one to object. This is so generally the rule that a departure from it in any instance is somewhat calculated to excite suspicion, and in this case it might lead to one, that the prevailing reason why the plaintiff seeks the equitable interposition of this jurisdiction is, that he doubts the validity of his grounds as legal or equitable defenses in any other. Certainly, in the granting of injunctions, which is not a matter of right, but rests in the sound discretion of the court, we ought not, in this jurisdiction, to enjoin defendants who never intended to institute any proceedings whatever here from bringing cases in the state wherein the plaintiff is located which, for aught that appears, would be there legal, and might be prosecuted to a successful issue, and in a manner calculated to cause the least expense and inconvenience to the plaintiff. The plaintiff, however, says (citing *Brewster v. Colegrove*, 46 Conn. 105) that "where the allegations of a bill in equity are sufficient to give a court of equity jurisdiction, and the case goes to a hearing upon its merits, and the facts are found, the jurisdiction is not defeated by the fact that the finding shows that the petitioners had adequate remedy at law." This rule, undoubtedly correct in cases where it has proper application, has none here. Neither the allegations of the complaint, so far forth as upon the plaintiff's claim held relevant to the issue, nor the hearing, which

was not a full one and upon the merits, but only as to a single issue, nor the nature of the relief sought, would warrant such application.

As these considerations are decisive of the case, we might with propriety, so far as that is concerned, stop here, but as other claims necessary to be established as a basis for the plaintiff's theory, which, for the sake of testing that theory, we have assumed, were fully argued, and are of interest to the profession, and in order that we may not be misunderstood as assenting to them, we will give them some examination. It was, as we have seen, the plaintiff's contention, that conceding the assignors' right of action against the plaintiff, the defendants had no such right. In support of this view a double claim was made: 1. That such right as these assignors had was not assignable; and 2. That if assignable, no valid assignments to the defendants had been made. It is rather hard to treat either of these claims distinctly, without involving some considerations pertinent to the other. But we will endeavor to do so. As to the assignability, it is said that the transaction between the plaintiff and the owners of the policies operated, *prima facie*, to end all liability, and that "a receipt in full, in the absence of any impeachment for fraud or mistake, is valid, and the discharge of the entire debt": *Aborn v. Rathbone*, 54 Conn. 444; that therefore if any of the assignors had brought suit, either in the complaint or by special answer, the necessity of setting aside such receipt and settlement would have been presented at the very outset; so that, as claimed, the only thing which such assignors had was a right to apply for such rescission, and that a mere right to bring a suit at law or in equity is not the subject of bargain and sale or of assignment. Now, it seems to us that to this claim there are many decisive answers, one being that conceding that a receipt in full, in the absence of fraud or mistake, is valid and a discharge of the entire debt, it is only so upon the assumption of the non-existence of what is here claimed to exist. If, to the claim of a receipt in full, it would be necessary for the plaintiff to plead fraud or mistake, or even ask that on such an account the receipt should be surrendered, it does not follow that all which the plaintiff has is a bare right to make such a demand. If he had nothing more, he could not have that. As well say that if the statute of limitations had run against the original obligation, but the creditor relied upon a new promise, the debt could not be as-

signed, because he would have been met in a suit by a plea of such statute, and all that he had was a mere right to remove the discharge by the plea of a new promise. The fraud or mistake which induces the giving of a receipt in full does not discharge a debt; nor does the receipt so obtained, only to be revived again on the removal of such obstruction to recovery. That *dicta* may be found, supported by most eminent authority, that "the assignment of a mere right of action to procure a transaction to be set aside on the ground of fraud is not admitted," is certain. The difficulty in construction and application lies in the fact that the phrase is somewhat ambiguous, and if it remains as true to-day, and in Connecticut, as it was in England in 1835, when *Prosser v. Edmonds*, reported in 1 Younge & C. 481 (which is the primal authority for the doctrine), was decided, it is, as we shall see hereafter, because it rests upon a different reason and receives a far more restricted practical construction. The objection then was, that such an assignment violated the policy, if not the letter, of the law against champerty and maintenance, as operating merely to promote or procure litigation. The ancient law made the principle subordinate to the instance. The modern is the reverse. Under the former, public policy was opposed to champerty and maintenance, and therefore all contracts which savored of these vices were void. Under our present law, public policy is the sole consideration, and contracts formerly held void by reason of champerty and maintenance may or may not be contrary to such policy. If, therefore, it be stated that "a mere right of action to procure a transaction to be set aside on the ground of fraud is not permitted here," the expression should be understood to mean that it would be opposed to public policy to permit a person claiming a right to set aside a transaction on the ground of fraud and to be invested with his former beneficial interest to separate the former from the latter and to transfer that without the other. It is unnecessary, however, to pursue this further, since, if the rule be correctly stated in the quotation made in the plaintiff's brief from Pollock on Contracts, 299, that "the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad," it seems to us manifest that the transaction here is of the former character. The principles upon which choses in action are now held assignable are clearly stated in Pomeroy on Remedies and Remedial Rights, sections 144 to 153, inclusive, and

a multitude of cases there cited are confirmatory of our present views.

It is, however, as we have seen, further said, that if assignable, no valid assignment to the defendants, or either of them, was made. It is said that the purported assignments show by their character, as well as by the nature of the interest (to which latter we have already referred), that these transactions are champertous, and that they are opposed to public policy. So far as champerty is concerned, we fully agree with the opinion expressed by this court in *Richardson v. Rowland*, 40 Conn. 565, that the reasons which made such a law salutary or necessary in England do not exist here, and that the enforcement of the law here would not always, perhaps not generally, promote justice, and we think the true inquiry may therefore be limited exclusively to the question whether the contract is opposed to public policy. Nor can we see that the contracts in question are so opposed. The court, in *Richardson v. Rowland*, 40 Conn. 565, quote with evident approval the remark of Parker, C. J., in giving the opinion of the court in *Thurston v. Percival*, 1 Pick. 417: "It sometimes may be useful and convenient, when one has a just demand which he is not able from poverty to enforce, that a more fortunate friend should assist him, and wait for his compensation until the suit is determined, and be paid out of the fruits of it." It would manifestly be both useful and convenient to policyholders of the plaintiff residing in this state who, by the successful results of a litigation brought by one of their own class, had been led to believe that far more was justly due to them than had been represented, and on the strength of which representation they had surrendered their policies, having thus, as they then believed, just demands, the individual enforcement of which, to any person in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility, that a more fortunate person, of experience, ability, and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of them. And whatever was the motive of the defendants, whether selfish or philanthropic, inasmuch as we cannot see why the only avenue practicable to the assignors is one which could lead to any unjust consequences to the plaintiff, we can discover no rule of public policy that would be thereby violated.

It is said, further, that these assignments did not create the

defendants assignees and equitable and *bona fide* owners of these rights of action, and the following cases in this state are cited: *Fitch v. Gates*, 39 Conn. 366; *Bixby v. Parsons*, 49 Conn. 483, 487; 44 Am. Rep. 246; and *Olmstead v. Scutt*, 55 Conn. 125. In each of those cases it was held that the assignee acquired no right of independent action or of set-off. But the principle of such decision is not applicable here. The ground was, that the assignee was such for the mere purpose of such action or set-off, having no beneficial interest or title. Here it was the beneficial interest which was expressly stipulated for, and which the assignees intended to acquire and the assignors to convey. The form of the transaction was an absolute transfer, under seal, to Mrs. Fuller, and although the real consideration and purpose appeared in the paper executed by her husband, Austin B. Fuller, which contained, among other things, the reservation of a right to reassign in discharge of liability, yet that real purpose, as there expressed, was a judgment and recovery for the assignees.

The defendants insist, that having, by the action of the plaintiff, been brought into court, they are entitled to judgment in their favor upon the first defense, and also to the same right to "prosecute their counterclaim as they would have had if the whole case had been on trial in the superior court." In this view we do not, however, concur.

The superior court is advised to dissolve the injunction and dismiss the complaint.

INJUNCTION — RESTRAINING SUIT IN ANOTHER STATE. — Courts of one state will not restrain the prosecution of a suit pending in a sister state, which has jurisdiction of the subject-matter and the parties: *Carson v. Dunham*, 149 Mass. 52; 14 Am. St. Rep. 397, and note; note to *Griffith v. Langedale*, 22 Am. St. Rep. 184; but see *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448, and note.

ASSIGNMENT OF RIGHT OF ACTION. — A right of action could not be assigned at common law, but this rule has been very generally superseded by statutes, and never prevailed in equity: *Thalhimer v. Brinckerhoff*, 3 Cow. 623; 15 Am. Dec. 309. An assignment of a plaintiff's claim for damages in a pending suit to secure an attorney's fee is not a bar to its continued prosecution in the plaintiff's name: *Rajnowski v. Detroit etc. R. R. Co.*, 78 Mich. 681. A cause of action for labor on a contractor's bond is assignable, and passes upon an assignment of the claim for the labor: *Sepp v. McCann*, 47 Minn. 364.

CHAMPERTY. — For a discussion of this subject, see extended note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316.

BARTHOLOMEW v. MUZZY.

[61 CONNECTICUT, 337.]

CONVEYANCES, INTERPRETING, BY THE INTENTION OF THE PARTIES. — A deed must, if possible, be so construed as to effectuate the intent of the parties, and in arriving at the intent expressed or implied in the language used, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence.

CONVEYANCE OF AN ESTATE TO COMMENCE IN THE FUTURE. — By the common law, any limitation by which an estate of freehold in corporeal hereditaments purports to be so granted as to commence upon the expiration of a fixed interval of time after the execution of the grant, or upon the happening of some future contingency, other than the determination of the precedent estate of freehold, was void in its inception.

CONVEYANCE TO HUSBAND AND WIFE. — When a husband conveys to his wife's brother, who immediately executes a conveyance purporting to convey the same realty to the wife, upon condition that she shall survive her present husband, and in such case only, to her heirs and assigns forever, and also purporting to convey the same property to the husband, his heirs and assigns, upon the condition that he survive his wife, and stating that it is expressly understood that the property is to be vested in the wife and her heirs in case she outlive her husband, but in case she did not outlive him, then to be vested in such husband's heirs and assigns, such conveyance vests in the husband and wife the use of the property during their joint lives, and the contingent remainder to the survivor.

CONTINGENT REMAINDERS AND EXECUTORY INTERESTS WERE NOT ASSIGNABLE at the common law, though they might, as possibilities coupled with an interest, be devised under the English statute of wills, or released at common law, or bound by a conveyance operating by way of estoppel, and contracts, and assurances relating to them, based upon valuable consideration, might generally be enforced in equity.

CONTINGENT REMAINDERS, TRANSFERS OF. — If two persons have the use of property for their joint lives, with a contingent remainder to the survivor of them, one of them may release to the other his interest in the property, present and future.

CONTINGENT REMAINDER, WHEN ASSIGNABLE. — When the person is ascertained who is to take if the event happens, the remainder may be granted, and the grantee takes the place of the grantor, with his chance of having the estate.

HUSBAND MAY CONVEY REAL PROPERTY TO HIS WIFE through the medium of a third person.

E. Peck, for the appellants.

F. L. Hungerford and N. E. Pierce, for the appellee.

TORRANCE, J. This is an action to recover the possession of certain real estate, brought by the plaintiff as administrator of one Lauren Byington, against the defendants as administrators of Julia P. Byington.

The facts found by the court below, which bear upon the questions decided by this court on the appeal, are in substance the following: From a time prior to June 10, 1843, until June 28, 1867, when she died, Lauren Byington and Julia P. Byington were husband and wife, living upon the land in suit, and using also adjoining land of Julia for their common family use. Prior to June 10, 1843, the title in fee to the demanded premises was in Lauren. On that day he executed and delivered to Edward A. Hart, his wife's brother, a deed of the demanded premises, in the usual form of warranty deeds, reciting a consideration of fifteen hundred dollars received from said Hart. On the same day, Hart executed and delivered a quitclaim deed of the same land back to said Lauren and Julia. It was in evidence in the case that there was no change of possession when the deeds were executed and delivered; that during their joint lives, the possession of Lauren and his wife was continuous and uninterrupted; and that no claim of any right, title, or interest in the premises, after the deeds were delivered, was ever made by Hart.

On the 19th of January, 1854, English and Welch recorded a certificate of lien upon the premises for the sum of \$253 for labor performed upon and materials furnished for a building thereon. On the twenty-third day of January, 1854, Lauren executed and delivered to English and Welch, for the recited consideration of \$470, a quitclaim deed of the premises, in the usual form, and on the next day English and Welch executed and delivered to Julia a like quitclaim deed of the premises, stating the same consideration. There was no extrinsic evidence in the case explanatory of the certificate of lien or of the two last-mentioned quitclaim deeds.

After the death of Julia, in 1867, leaving a will which gave to her husband the equitable life use of all her property, Lauren continued to occupy the premises substantially until his death, on the 4th of December, 1889. After his death, the administrators of Julia entered upon the premises in question, claiming them as part of Julia's estate, and have ever since retained possession. The court rendered judgment in favor of the plaintiff, as administrator of Lauren, and the defendants, from that judgment, bring this appeal.

The case turns upon the construction of the deed from Hart to Lauren and Julia, of June 10, 1843, in connection with the quitclaim deeds of Lauren and English and Welch in 1854.

The material parts of the deed from Hart to Lauren and

Julia are as follows: "I, Edward A. Hart, for divers good causes and considerations thereunto moving, especially for fourteen hundred dollars received to my full satisfaction of Julia P. Byington, wife of Lauren Byington, have remised, released, and forever quitclaimed, and do by these presents, for myself and heirs, justly and absolutely remise, release, and forever quitclaim, unto the said Julia P. Byington, upon the condition only that she outlive and survive her present husband, and in such case, and in such case only, to her heirs and assigns forever, all such right and title as I, the said grantor, have or ought to have in or to the following described piece of land [describing it]. To have and to hold the premises unto her, the said Julia P. Byington, her heirs and assigns, to the only use of the said Julia P. Byington, her heirs and assigns forever, upon the aforesaid condition, that the said Julia P. Byington do outlive and survive her present husband, to wit, the said Lauren Byington. And in consideration of the sum of one hundred dollars to me paid by the aforesaid Lauren Byington, I have remised, released, and forever quitclaimed, and do by these presents, for myself and my heirs, justly and absolutely remise, release, and forever quitclaim, unto the said Lauren Byington, his heirs and assigns, all such right and title as I, the said E. A. Hart, have or ought to have in or to each and every part of the aforesaid described land and buildings, upon the condition that he, the said Lauren Byington, do outlive and survive his said wife, Julia P. Byington; and it is to be well and expressly understood that the premises aforesaid are to be wholly and absolutely vested in the said Julia P. Byington, her heirs and assigns forever, in case that she do outlive and survive her husband, the said Lauren Byington; but in case that she, the said Julia Byington, do not, then in such case the premises aforesaid are to be wholly and absolutely vested in said Lauren Byington, his heirs and assigns forever." The conclusion of the deed was in the ordinary form of quitclaim deeds, barring and excluding from the premises Hart and all others claiming under him.

The defendants claim that this deed conveyed to Julia an estate in fee upon a condition subsequent, and that consequently the limitation of a fee afterwards attempted to be made to Lauren by the same deed in the same land is void, because it violates the elementary rule of conveyancing, that a fee cannot by deed be limited after a preceding fee. The

plaintiff claims, either that the deed conveyed a joint life estate by implication to the husband and wife, with a contingent fee to the survivor, or that such an estate remained in the grantor as trustee for the husband and wife during their joint lives, and upon the death of one of them the fee vested absolutely in the survivor.

The plaintiff further claims that in either of said alternatives the right of Lauren to the fee was not a present right, or of such a nature that it could be conveyed by his deed to English and Welch; while the defendants contend that in either case Lauren's right to the fee was of such a nature that it was conveyed to English and Welch, and ultimately to Julia, his wife, and that she thereby became vested with all of Lauren's rights in the land. One of the important questions in the case is, therefore, What estate was conveyed to the husband or wife, or both, by this deed from Hart to them?

At the outset we are compelled to reject the claim of the defendants, that it conveyed a fee to the wife, and then attempted to limit an estate in fee in the husband. If we take the language of the deed itself, without the aid of the circumstances under which it was given, it is hardly possible to take this view of it, and if read, as it ought to be, in the light of those circumstances as found by the court, such a view becomes impossible. The entire deed must be read together. Nothing by it passed to either the wife or husband till it was delivered. The fact that the conveyance is made to the parties separately in the deed, or that the words of release to the wife are written first, is of no special importance. There is, in effect, but one act of release and one conveyance, and it took effect as to both at the same time, namely, when the deed was delivered.

Looking at the entire transaction of which this deed formed a part, we think it is quite clear that the releasor intended to treat the husband and wife exactly alike. It can, with about as much reason, be claimed that the limitation to the wife was void because it gave her a fee after one had been given to the husband, as that the limitation to the husband was void because it was a conveyance of a fee to him after one already given to his wife. What estate, then, did this deed convey to the releasees named therein?

As already suggested, the deed from the husband to Hart and from Hart to the husband and wife were parts of one single and entire transaction. Taking into account the rela-

tionship of the parties concerned in the transaction, and the circumstances attending it and under which it took place, we are irresistibly led to the conclusion that its main purpose and object was to convey to the wife an estate or interest of some kind in the property of the husband, leaving the rest of the estate ultimately in him. It was clearly not the main purpose of the transaction to convey anything to the husband, for he already owned the property absolutely; nor to Hart, for he immediately conveys the land back to the husband and wife, and makes no pretense of claim to it thereafter. Its main purpose was to modify or change the estate of the husband by the amount of that estate which should, as the result of the transaction, become vested in the wife. We think it is quite clear, also, as already hinted, that in this transaction the parties actually intended, as the result of it, to vest in the husband and wife an equal and undivided interest in the property. Whatever share or interest he conveyed to one, the releasor intended to convey a like share and interest, no more and no less, to the other. This, we think, is manifest from the language of the deed. And from the language of the deed, read in the light of the surrounding circumstances under which it was given, we are led to the further conclusion, that the parties concerned actually intended, as the result of this transaction, to vest in the husband and wife an equal and undivided interest in the property during their joint lives, and to give the remainder in fee to the survivor of them.

We concede, however, that it is not enough that the parties had such an intention in fact, unless they have expressed it in some way in this deed. The question is, not what did the parties actually mean to say, but what is the meaning of what they have said. In the construction and interpretation of written instruments of this kind, it is a familiar rule that the deed shall, if possible, be so construed as to effectuate the intent of the parties: *Bryan v. Bradley*, 16 Conn. 486.

In arriving at the intent expressed or implied in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence: *Grey v. Pearson*, 6 H. L. Cas. 106; *Strong v. Benedict*, 5 Conn. 220; *Griswold v. Allen*, 22 Conn. 98. "The only rule of much value . . . is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then,

taking it by its four corners, to read it": *Walsh v. Hill*, 38 Cal. 487.

The deed in question was evidently not drawn by a skilled conveyancer, but by a person not familiar with matters of this kind, and who found great difficulty in expressing clearly the evident intention of the parties. One skilled in such matters would undoubtedly have carried out this actual intent of the parties by conveying, in express words, to the husband and wife the use and improvement of the premises during their joint lives, and the remainder in fee to the survivor.

Such a conveyance of the fee would unquestionably be valid as a contingent remainder. "If A and B are tenants for their joint lives, remainder to the survivor in fee, here, during their joint lives, a remainder is vested in neither, yet on the death of either the remainder instantly vests in the survivor": 1 *Swift's Digest*, 96. "The fourth class of contingent remainders is where the contingency depends upon the uncertainty of the person who is to take the remainder, either because he is not in being or not ascertained at the time the limitation is made. . . . A grant to A and B for life, remainder to the survivor, would be of this kind": 2 *Washburn on Real Property*, 242.

It must be conceded that the deed in question does not, in form and in express terms, in accordance with the manifest and actual intent of the parties, convey the use and improvement of the premises to the releasees during their joint lives, but we think that intention is in substance and effect sufficiently expressed in the deed. Beneath all the verbiage and repetition of the deed, it is quite clear that the releasor is then and there to part with all his interest of every kind in the land, and the releasees are then and there to acquire the same, and the language used is sufficient to effectuate that intent.

It may be said, however, that the estate, whatever it was, which the deed attempted to convey to the husband and to the wife was conveyed to them on condition that one should survive the other, and therefore no present interest passed to either, but a life use at least remained in the releasor. In such case, the defendants claim that the conveyance in question violates one of the fundamental rules of the law relating to conveyances, and is void.

By the common law, any limitation by which an estate of freehold in corporeal hereditaments purports to be so granted

as to commence, either upon the expiration of a fixed interval of time after the execution of the assurance, or upon the happening of some future contingency other than the determination of a precedent estate of freehold, was void in its inception. A limitation by way of contingent remainder which was not immediately preceded by a vested estate of freehold was held to be a violation of this rule, and hence was void in its inception: *Challis on Real Property*, 73. The technical and subtle reasons upon which this rule was founded have to a great extent ceased to exist, and whether the rule itself, in all cases and under all circumstances, would have the controlling force it once unquestionably had, we have no occasion here to consider, because we do not think this deed violates the rule in question. Read in the light of the surrounding circumstances, the language of the deed does, in effect, convey to the husband and wife the use of the premises during their joint lives, and the fee to the survivor. In effect, the releasor says: "I here and now release and forever quitclaim to Julia P. Byington and Lauren Byington all the right, title, and interest which I have or ought to have in this land. In case Julia outlives Lauren, she is to have and to hold the land to her and her heirs forever. In case Lauren outlives Julia, he is to have and to hold the land to him and his heirs forever." If the deed had been so written, there can be no doubt that the language would be held sufficient to effectuate the actual intent of the parties. We read the deed as if it had been so written, and in doing so do no violence to its language, for we think this, in substance and effect, is the meaning of the language used. It is true that the word "condition" is used a number of times in the deed, but it is always used to qualify the event upon which the fee is to belong absolutely to the survivor, and never to qualify the time at which Hart's entire and absolute interest is to pass to the husband and wife.

Under the circumstances, we think the deed conveyed to the husband and wife the use of the property during their joint lives, and a contingent remainder to the survivor.

The next question is, whether the husband conveyed, and the wife ultimately acquired, all his rights in the premises, as the result of the transactions between the husband and wife and English and Welch in 1854. As we have seen from the citations hereinbefore made from *Swift* and *Washburn*, the remainder limited by the deed in question falls within the class called contingent remainders. In 1854 it still belonged to

this class. If, at the time Lauren delivered his quitclaim deed to English and Welch in 1854, the remainder had been what is called a vested remainder in him, subject only to the termination of a life estate in his wife, there can be no doubt that his deed would have conveyed such interest to the releasees. The claim of the plaintiff is, that the remainder to Lauren was, at the time of his deed to English and Welch, a contingent remainder of such a nature that it was not conveyed by his quitclaim deed.

The rule at common law undoubtedly was, that both contingent remainders and executory interests were only possibilities, and therefore were not assignable *inter vivos*; though they might, as possibilities coupled with an interest, be devised under the English statute of wills; or they might be released at common law, or bound by a conveyance operating by way of estoppel, and contracts and assurances relating to them for valuable consideration might generally be enforced in equity: Challis on Real Property, 52; *Smith v. Pendell*, 19 Conn. 112; 48 Am. Dec. 146.

At the present time, however, even where the common-law rule as to the assignability of such interests prevails, it is not universally true that they are not assignable *inter vivos*. Thus Washburn says: "But it is now settled that where the contingency upon which the remainder is to vest is not in respect to the person, but the event, where the person is ascertained who is to take if the event happens, the remainder may be granted or devised, and the grantee or devisee will come into the place of the grantor or devisor, with his chance of having the estate": 2 Washburn on Real Property, 240.

A contingent remainder like the one here in question is in some respects peculiar and different from others falling within its class, but whether it is in the ordinary sense assignable or not, we have no occasion at present to consider. Even at common law, and under our law also, a contingent remainder, even of this kind, could be effectually released to the tenant of the particular estate in possession: *Smith v. Pendell*, 19 Conn. 112; 48 Am. Dec. 146.

As before stated, the husband, in 1854, conveyed in form all his interest in the land to English and Welch, and they immediately conveyed in like manner all their interest to the wife. We think the only reasonable view that can be taken of the transaction, in the absence of all explanation, is, that it

was intended as a release to the wife of all the husband's interest, present or future, in the land under the Hart deed.

At common law a husband could not convey or release directly to his wife, but by immemorial usage in this state, he could do so indirectly, through the medium of third parties: 1 Swift's Digest, 39. Had not the relation of husband and wife subsisted between these parties in 1854, Lauren could have released to Julia directly, and such release would have been a valid and effectual release of all his interest, present or future, in the land under the Hart deed. The fact that because of such relation it was deemed necessary to accomplish the same purpose in an indirect way through third parties can, we think, make no difference in the result.

We hold, therefore, that in 1854 the wife became possessed of all the rights of English and Welch in the premises, and of all the present or future rights and interests of the husband under the Hart deed. As there is no claim or pretense that since that time the husband acquired any other rights or interest in the demanded premises save what he had by law as husband, and the equitable life use which he had under his wife's will, it follows that at his death no right or interest in the demanded premises of the kind claimed in this suit remained to his heirs or personal representatives.

For these reasons, there was error in the judgment appealed from, and it is reversed.

DEEDS — HOW INTERPRETED. — Construction of words in a deed should be that which, on a general view of the instrument and of the intention of the parties, seems most likely to accomplish what they intended: *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809, and note; *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; note to *Eiseley v. Spooner*, 8 Am. St. Rep. 131; extended note to *Berridge v. Glassey*, 56 Am. Rep. 324.

REMAINDER — VESTS WHEN. — It is a general rule that where a particular estate is created by will, with remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the prior estate determines: *Bruce v. Bissell*, 119 Ind. 525; 12 Am. St. Rep. 436, and note. A remainder is vested when a present interest passes to a party to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates: *Howard v. Peavey*, 128 Ill. 430; 15 Am. St. Rep. 120, and note.

CONTINGENT REMAINDERS — ALIENATION OF. — A contingent remainder is not subject to levy and sale against the party entitled to it, and no title passes to a purchaser by sheriff's deed: *Howard v. Peavey*, 128 Ill. 430; 15 Am. St. Rep. 120. As to how contingent remainders are barred, defeated, or conveyed, see extended note to *Snelling v. Lamar*, 17 Am. St. Rep. 839. A contingent remainder can be conveyed only by devise: *Stewart v. Neely*, 139 Pa. St. 309.

HUSBAND AND WIFE — CONVEYANCE BY HUSBAND TO WIFE THROUGH THIRD PERSON. — When a husband and wife hold an estate in entirety, the husband may convey his interest therein, through a third person, to his wife, and she can then mortgage the estate in her own name: *Donakus v. Hubbard*, 154 Mass. 537; 26 Am. St. Rep. 271, and note. Conveyances between husband and wife by the aid of a third person will be closely scrutinized, but are not necessarily fraudulent as to creditors, and may be deemed valid to the extent of the consideration passing: *Steele v. Coon*, 27 Neb. 586; 20 Am. St. Rep. 705, and note; see note to *Wilder v. Brooks*, 88 Am. Dec. 54.

PECK v. HOOKER.

[61 CONNECTICUT, 412.]

JUDICIAL OPINIONS, RIGHT TO COPY AND PUBLISH. — *Mandamus* will not issue to compel the reporter of the decisions of the supreme court of errors of Connecticut to permit the applicant at all reasonable times to make copies of such opinions in the custody of the reporter, or to furnish certified copies thereof, at the usual and reasonable rates of compensation, for publication out of the state, in advance of their official publication by the reporter.

E. Peck, appellant, *per se*.

C. E. Gross, for the appellees.

SEYMOUR, J. The plaintiff in this case claims that the superior court should issue a writ of *mandamus* to compel the reporter of the judicial decisions of the supreme court of errors to permit him, at all reasonable times, and when it will not interfere with his use of the same in his official duties, to make copies of any opinions of said last-mentioned court in his custody, or furnish him certified copies thereof, at the usual and reasonable rates of compensation therefor, for publication out of the state, in advance of their official publication by the state.

The statute regulating the appointment and duties of the reporter is section 825 of the General Statutes: "The judges of the supreme court of errors shall, from time to time, appoint a reporter of its judicial decisions. He shall make reports of the cases argued and determined in said court, and prepare the same for publication; and it shall be his duty to insert after the *syllabus* of each case the date of the argument and the date of the decision."

Section 833 requires that "the reports of the cases hereafter argued and determined in the supreme court of errors shall, when prepared by the reporter of judicial decisions and ready

for publication, be published under the supervision of the comptroller, who shall cause the several volumes to be stereotyped, and to be copyrighted in the name of the secretary, for the benefit of the people of the state."

Section 3709, fixing the salaries and fees of certain officers, provides for "the reporter of judicial decisions, three thousand dollars, with one thousand dollars additional thereto during the occupancy of the present reporter, and at the rate of twenty-five cents a page for any copy, to be paid by the party requiring it."

If the plaintiff is entitled to a *mandamus*, it is because there is something in the above-quoted sections of the statute which makes it the duty of the reporter, upon request, to make for him, upon payment therefor, or permit him to make, copies of the written and unpublished opinions in his custody, that they may be published in advance of their publication by the state under the supervision of the comptroller.

Do the statutes, either directly or by implication, impose any such duty upon the defendant?

The state has seen fit to provide that the reports of the cases argued and determined in the supreme court of errors shall, when prepared by the reporter and ready for publication, be published under the supervision of the comptroller. It has made it the reporter's duty to prepare the reports for publication. Will the courts of the state, which thus provides for controlling the publication of the reports of its court of last resort, compel the reporter to furnish for outside advance publication the unpublished opinions of that court, which the law requires him to prepare for publication in the manner by statute prescribed "for the benefit of the people of this state"?

It is argued that the statute giving the reporter a fixed salary, "and at the rate of twenty-five cents a page for any copy, to be paid by the party requiring it," imposes upon him the official duty of furnishing copies upon demand and tender of payment for any purpose whatever, including advance outside publication. This is an attempt to extend a statute by implication beyond any reasonable limits. Indeed, it seems to us that in view of the clearly expressed design of the state to control the publication of its judicial reports, a reporter would be blameworthy who should knowingly aid in defeating that design by furnishing opinions to other parties for advance publication.

It was not without good reasons that our statutes on this sub-

ject were passed. It is of public concern that the judicial reports should not be published until they are "prepared by the reporter and ready for publication." Until that time the opinion, as well as the statement of the case and the *syllabus*, ought to be open for any correction that may be necessary for the proper understanding of the case. Until that time they cannot be relied on as necessarily expressing the final voice of the court, and therefore as entitled to be published.

At any rate, it cannot be the duty of the reporter, directly or indirectly, to contravene the policy of the state in this behalf,—a policy which it is not claimed has ever prevented any one from obtaining a copy of any judicial opinion as soon as filed, who wanted it for his information or to gratify his curiosity, and which has helped to secure the accuracy of the published reports.

We might have contented ourselves with simply referring to the case of *Gould v. Banks*, 53 Conn. 415, 55 Am. Rep. 143, and holding that case as deciding this. For if it is true, as contended by the plaintiff, that the supreme court of the United States, in *Banks v. Manchester*, 128 U. S. 244, have decided that no copyright can be had in judicial opinions, yet it still remains true that it is for the state to say when and in what manner the decisions of its courts shall be published. But the present case is an interesting one. The effort to expedite the publication of judicial opinions is commendable. Absolute accuracy is, however, much more important than mere celerity, and it needs only an examination of our statutes and a careful consideration of the policy upon which they are founded to show that the defendant was justified in refusing the demand of the plaintiff upon which the application for the writ is predicated.

The demurrer was properly sustained, and there is no error in the judgment.

COPYRIGHT IN JUDICIAL OPINIONS. — A state has a copyright in the judicial opinions of its judges: *Gould v. Banks*, 53 Conn. 415; 55 Am. Rep. 143, and extended note, in which the cases on this subject are collected and discussed.

HALL v. SOLOMON.

[61 CONNECTICUT, 476.]

CONVEYANCE, RESTRICTING, BY PAROL. — A PAROL AGREEMENT, BEING PART OF THE CONSIDERATION OF A SALE, restricting the use of the premises in some particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land, and the admission of parol evidence to prove such an agreement is not an infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written agreement.

TRUSTEES' AUTHORITY, WHO MAY NOT DISPUTE. — Where persons acting as trustees of certain devisees of real property make a contract of sale on behalf of such devisees, and exact an agreement from the purchasers that no part of the property shall be used for the sale of intoxicating liquors, a purchaser who accepts such an agreement as part of the consideration of the sale to him cannot avoid it on the ground that the trustees were not authorized to make the sale or to execute the agreement.

STATUTE OF FRAUDS. — AN AGREEMENT NOT TO CARRY ON A PARTICULAR CLASS OF BUSINESS on real property is not within the statute of frauds. It is not a contract for the transfer of lands or for some interest in them, nor is it an agreement not to be performed within one year.

AGREEMENT NOT TO USE LAND FOR THE SALE OF INTOXICATING LIQUORS does not prohibit the keeping of a drug-store, where liquors are sold in the manner in which they are ordinarily sold by druggists, but not to be drank upon the premises.

SPECIFIC PERFORMANCE OF AN AGREEMENT, ENTERED INTO BY THE PURCHASERS of different parcels of real property, not to use it for the sale of intoxicating liquors, will be enforced against one of them, though some of the purchasers have sold their lots to grantees who are not bound by the agreement, if none of such grantees have in fact violated it.

J. Walsh, for the appellant.

O. E. Perkins and F. L. Hungerford, for the appellees.

CARPENTER, J. On the 19th of April, 1884, Thomas S. Hall, one of the plaintiffs, and Lauretta S. North, trustees of the estate of Henry North, deceased, being duly authorized by the will of said Henry North to sell and convey real estate held by them in trust, sold and conveyed a building lot on Main Street, in the city of New Britain, to the defendant. About the same time, and within one or two years before, they also sold other building lots in the immediate vicinity to other parties. The several purchasers, including the defendant, entered into a parol agreement with the trustees that no portion of the premises so sold should be used for the sale of intoxicating liquors. This agreement was in each case a part of the consideration of the sale. The fact that such an agreement was required of each of the purchasers was an inducement operative with

most of the purchasers in buying the lots and locating their business in that locality. Most of the purchasers are co-plaintiffs with said Hall.

It is alleged, and found true, that the "defendant now intends to use, or allow to be used, the premises bought by him as aforesaid for the sale of liquors, and that he threatens to lease the lower or main floor of the building erected by him on said land to one James Dawson for the purpose of establishing and carrying on a liquor saloon."

The superior court issued a permanent injunction, restraining the defendant from using, or allowing to be used, his said premises for the purposes of a liquor saloon or for the sale of intoxicating liquors. The defendant appealed.

The first reason of appeal is, that the court erred in admitting parol evidence of such agreements, "on the ground that all parol statements, representations, or agreements in relation to said land were merged in said deeds; that the deeds are conclusively presumed to contain the final and whole agreement in relation to said land; and that such parol evidence was an attempt to vary, qualify, and contradict the absolute language of said several deeds and their legal operation and effect."

It will be remembered that it is not the office of a deed to express the terms of the contract of sale, but to pass the title pursuant to the contract. Therefore, a parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular, for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written instrument: *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398; *Pierce v. Woodward*, 6 Pick. 206; *Willis v. Hulbert*, 117 Mass. 151; *Tallmadge v. East River Bank*, 26 N. Y. 105.

The third, fourth, fifth, sixth, fourteenth, and fifteenth reasons of appeal may be considered together. They, in effect, deny the power of the trustees to sell real estate, having no authority under the will, and not being authorized by any court to do so; deny that any title was conveyed to the purchasers; and deny that the trustees had any power to make the contracts in question with the purchasers.

It may be that there is a defect of power in the trustees to make these conveyances, but it does not follow that the deeds

are void. Thomas S. Hall, the husband of one of the devisees, and the agent of all of them, the devisees being the owners of the Main Street property, made contracts for the sale of these lots. The deeds, which were designed to pass the title pursuant to the contracts, were executed by Laretta S. North and Thomas S. Hall as trustees. Laretta S. North was the widow, and as such had an interest in the estate, was in fact a trustee, and was executrix. Thomas S. Hall was interested as husband of one of the devisees, and was trustee. He was also the agent of the other devisees. Each purchaser paid a valuable consideration, of which the devisees now have the benefit, took possession of the premises, made valuable improvements thereon, and have enjoyed the same, unmolested, until the present time. Under these circumstances, a court of equity, if need be, will have no difficulty in finding a way in which to complete and quiet the purchaser's title. They cannot, therefore, be heard to say that they took nothing by their deeds, and consequently that their agreements concerning the use of the land were void. As the plaintiffs' counsel well remark, this objection misapprehends the capacity in which the persons acted who made the agreements with the several purchasers, and the parties benefited by said agreements. "It was the desire of the owners of the land, namely, the devisees under the will of Henry North, that no portion of the premises fronting on Main Street should be used for the sale of intoxicating liquors." Thomas S. Hall was the agent of these owners; and whether he alone made the several agreements, or made them jointly with Mrs. North, is immaterial. In either case, equity will regard them as having been made with the owners. In that view, there is no difficulty in regarding the agreements as valid, and as a part of the consideration for the deeds.

The seventh, eighth, and ninth reasons of appeal relate to the statute of frauds. The language of the statute is: "Or upon any agreement for the sale of real estate, or any interest in or concerning it." Counsel for the defendant do not, in their reasons of appeal, or in their brief, bring the case quite within the language of the statute. They contend that it is an agreement for an interest in or concerning real estate. An agreement for the sale of an interest in or an interest concerning real estate contemplates a transfer of some portion of the title. An agreement not to carry on a particular kind of business on certain premises is not an agreement for the sale of an interest in or concerning said premises. In 1809 this court said: "The

agreement not to use his mill after a certain day is not within the statute of frauds and perjuries; for this statute contemplates only a transfer of lands or some interest in them": *Bostwick v. Leach*, 3 Day, 476. That is as sound law to-day as it was eighty years ago. See also 8 Ency. of Law, 701, 703.

Nor is it an agreement not to be performed within one year, under another clause of the statute. It has been pretty uniformly held that contracts which may be performed within one year are not within the statute: *Peters v. Inhabitants of Westborough*, 19 Pick. 364; 31 Am. Dec. 142; *Roberts v. Rock-bottom Co.*, 7 Met. 46; *Lyon v. King*, 11 Met. 411; 45 Am. Dec. 219; *Doyle v. Dixon*, 97 Mass. 212; 93 Am. Dec. 80.

The tenth reason of appeal is, that "the court erred in holding that the plaintiffs were entitled to relief, they having allowed a violation of the alleged contract or agreement on the premises of the plaintiffs."

We suppose that this refers to the case of the druggist. The finding is as follows: "Up to the present time, all the owners of said premises have faithfully performed and kept their agreement as to the use of the premises for the sale of intoxicating liquors, unless it be that one of the stores has been occupied as a drug-store, where, under a so-called package license, liquors have been sold as ordinarily sold by druggists, but not to be drank upon the premises. None of the owners of the property have objected to such a use of said store." We are inclined to think that such a use is not within the prohibition of the agreement. The parties in interest so interpreted it, and we may properly so regard it.

Under the eleventh reason of appeal, it is insisted that there is a want of mutuality in the agreement, by reason of which a court of equity will not enforce it, because two of the original purchasers have conveyed their lands, and the agreement, if any, does not bind their grantees. The finding shows that Andrew J. Sloper and William C. Pope, soon after their purchases, sold their lots to S. W. Damon and William I. Fielding, respectively. Damon bought with knowledge of the agreement, and is a party plaintiff. The other purchaser has never used his premises for the sale of liquor, though not a party to this proceeding. We do not think that these sales ought to defeat the plaintiffs' right of action.

The sixteenth and seventeenth reasons of appeal are, in substance, that a present injunction will not lie against the defendant, on account of the alleged lease to Dawson. This

objection was not pursued by the defendant's counsel in the argument, and is not noticed in the brief.

We will only add that the lease appears not to have been consummated. At first, it was on condition that Dawson should receive a license. A license was at first refused. Subsequently the commissioners voted to grant it, but Dawson has never called for it or paid for it. He took possession just before the injunction was served, but has made little or no use of it since, and has paid no rent. He had full knowledge of the claims of the plaintiffs. Under these circumstances, we do not think the court was bound to notice Dawson's interest as lessee.

There is no error in the judgment appealed from.

DEEDS — RESTRICTION IN, AS TO BUSINESS CONDUCTED ON THE LAND. — A limitation which provides that intoxicating liquors in less quantities than five gallons are not to be sold on the land, because the vendor's store and dwelling were near by, will be enforced, since it is reasonable: *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274, and note. A condition in a deed that no intoxicating liquors shall ever be sold on the premises is valid, and although a forfeiture will not be enforced for its breach, yet an injunction may issue against it: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556. As to the admissibility of parol evidence to show such agreements, see note to *Green v. Batson*, 5 Am. St. Rep. 200.

SPECIFIC PERFORMANCE OF AGREEMENTS RESTRICTING THE USE OF LAND. — An agreement restricting the use of land may be enforced in equity against all those who take the estate with notice of such agreement: *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715, and note; *Eckhart v. Irens*, 128 Ill. 568.

WILCOX v. WOODRUFF.

[61 CONNECTICUT, 572.]

MECHANICS' LIENS. — The rights of claimants of mechanics' liens are purely statutory, and the statute, as it gives particular privileges to creditors, should be construed with reasonable strictness.

MECHANICS' LIENS. — WHERE THREE SEPARATE, INDEPENDENT BUILDINGS, on the same lot, belonging to the same person, are built at the same time, one who furnishes material and performs labor under one contract, keeping no account of the amount due from each house, cannot file and enforce a mechanic's lien covering the entire lot and all the buildings, under a statute creating a lien upon every building in the construction or repair of which labor is done or materials furnished. The statute must be construed as giving a lien on each building separately, and unless the claimant can state the amount due from each, he must fail.

H. M. Holcomb, A. F. Eggleston, and John Coats, for different appellants.

F. L. Hungerford and J. C. Gallagher, for different appellees.

FENN, J. This is an action to foreclose a mechanic's lien. E. R. Bishop & Co. purchased a lot of land on which they proposed to erect three dwelling-houses to rent. The houses were erected, the plaintiff, under an agreement, furnishing materials for that purpose. In a suit to foreclose his lien, others who claimed liens on the premises were made defendants. In their answers they also claimed foreclosures of their respective liens. The trial court rendered judgment for the lienors, and the other defendants appealed.

In each case the lienor filed but one lien, covering the entire lot of land, about three quarters of an acre, for supplies furnished, labor performed, etc., in the construction of the three dwelling-houses. The first and principal question in the case is, whether there should not have been separate liens for each dwelling-house. The material facts bearing upon this question are as follows: —

The plaintiff Wilcox is a lumber merchant. His claim is for lumber which entered into the construction of the three houses. C. E. Woodruff, one of the firm of E. R. Bishop & Co., stated to him that he and his associates had purchased the lot, that they had formed a syndicate, and that they were going to erect on the lot three dwelling-houses to rent. He wanted prices for the lumber for the three houses, and sought low prices because of the amount of the materials required. An agreement was made, pursuant to which Wilcox furnished the lumber for the houses. He did not keep a separate account of the lumber which entered into the construction of each house, and the same cannot now be ascertained. The dwelling-houses were intended to be, and were in fact, under one management, although they were capable of separation, and were separated before they were completed for the purpose of raising money thereon. One of them fronted on Camp Street, and the other two on Grand Street, and all were upon different grades.

The liens of the other claimants rest upon the same or similar facts. Each one claimed one lien only, for one sum, including the price of all materials furnished and labor performed, and filed but one certificate of lien, covering all the

land and all the houses. Did the superior court commit error in holding that the several liens were valid?

Had there been but one dwelling-house, and the other buildings had been a barn and other out-buildings connected therewith, all forming one homestead, the cases of *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 825, and *Lindsay v. Gunning*, 59 Conn. 296, would have been decisive of this case. Had the three dwelling-houses been built together in one block, so as to have formed practically but one building, the case of *Brabazon v. Allen*, 41 Conn. 361, would have controlled it. Do the facts, as they are, bring this case within the principle of those three cases? Here was a unity of title, unity of contract, and unity of performance. Separate items for the different houses were not required nor suggested, and no intimation appears to have been made of a contemplated division of the property for any purpose, until the buildings were so far completed as to render it feasible to separate them for the purpose of raising money thereon by mortgages. At that time it was impossible to charge each house with the materials that entered into its construction. Hence, if these liens are invalid, a lien was then impossible.

But we are of opinion that none of these considerations can avail. Nor, in our judgment, is there anything in the cases cited which supports the contention of the lienors. On the contrary, other cases within this jurisdiction are decisive against it. An examination of our statute, and of the cases in which it has received judicial construction, will, we think, clearly demonstrate this. The statute, at present constituting section 3018 of the General Statutes of 1888, creates a lien upon every building in the construction or repairs of which, or of any of its appurtenances, the claim arose. It provides that such claim shall be a lien on the land on which the building may stand, the building, and its appurtenances. It follows, therefore, that in order to be entitled to claim a lien, pursuant to the statute, on any building, for work done upon any other building, the latter must be either an appurtenance of the former, or land upon which it stands, as these terms are construed. And the same principle must apply when a lien is claimed upon several buildings for work done generally upon all. Of course the lienor's rights are purely statutory, and in *Chapin v. Persse and Brooks Paper Works*, 30 Conn. 474, 79 Am. Dec. 263, it is said that this statute, "as it gives peculiar privileges to certain creditors, contrary to the general policy

of our law, which favors an equal distribution of the effects of insolvents, should be construed with reasonable strictness." In that case a lumber dealer sold lumber for three paper-mills belonging to the same owner, which were undergoing repairs, two upon one piece of land and a third upon a separate piece. The three mills were in fact used together for the manufacture of paper in the different stages of the process, but two of the mills were so fitted with machinery that the whole process might have been carried on in either, and the other mill could easily have been supplied with machinery for that purpose. The dealer afterwards filed a certificate of his lien, describing the three mills together, and his lien as one lien upon the whole, and stating the whole amount due him as the amount of his lien. It was held that the certificate was void, both in respect to the description of the premises covered by the lien and in respect to the statement of the amount. The case cited differs from the present in two particulars. The mills stood upon two separate pieces of land, and the petitioners were requested to keep an account of the respective materials so furnished to each of the mills, and the account was in fact thus kept with each mill separately. But neither of these elements was regarded as important by the court, which said: "Now, the lien under such a contract, if it indeed amounts to a lien, or is anything more than a contract for the sale of merchandise, the amount or quantity of which is to be determined by the amount wanted for certain purposes, must, as we think, be a separate and distinct lien on each separate building with its appurtenances, and there was therefore, in this case, not one lien on three buildings, but three liens, each for the amount of the material that was delivered for the erection or repair of the particular mill upon which in point of fact it was put. . . . If such a course as was here attempted could be justified, then it would seem to follow that general contracts with builders to furnish materials for such houses as they might build within any limited time, or perhaps indefinitely, would bind all the buildings together for the materials furnished for all, and the inconvenience and injury to persons who had separate claims for work or materials for each of the buildings separately would be intolerable." In *Larkins v. Blakeman*, 42 Conn. 292, a single lien was filed upon a claim for materials furnished, under separate contracts, for two dwelling-houses, standing on adjoining lots and erected by the same builder, but one commenced about six weeks before the other. The lien was held

invalid. The court says: "The record does not show, and it is impossible now to ascertain, the amount furnished for each house. This is a fatal objection. The statute gives a lien upon each building and lot for materials furnished in the construction of that building only, and the certificate must state the amount so furnished as nearly as the same can be ascertained. This certificate states the aggregate amount for the two, but gives no information as to the amount furnished for each. This is not a compliance with the statute. It requires no argument to show that if the statute is not complied with, the lien cannot be maintained. If any is needed, it is readily found in the circumstances of this case; a large proportion of the amount, nearly the whole perhaps, may have been expended on one house, and yet the other is made to bear one half the burden. . . . We are unable to distinguish this case in principle from that of *Chapin v. Persse and Brooks Paper Works*, 30 Conn. 461; 79 Am. Dec. 263. Such distinction, however, is attempted, and our attention is called to the fact that the petitioner and the builders supposed that a lien existed, and that they and the other parties interested treated the property as subject to the lien. But a mechanic's lien exists, not by contract, but by statute, and no understanding or agreement of the parties will be of any avail when the requirements of the statute have not been complied with."

In *Brabazon v. Allen*, 41 Conn. 361, it was held that where a block of buildings, comprising several dwelling-houses, separated one from another by a partition wall, is erected upon a single lot, and work is done upon it as a whole, under one entire contract, the builder's lien extends as a single lien to the whole block. That case differs from the present only in one feature, but unlike the features of difference in the other cases cited, the law does regard that feature as important and controlling. The court, by Foster, J., well says: "As the right to liens is created by statute, the rights acquired, or whether any in a given case, must be determined by statute. We deem it wiser, therefore, to confine our attention mainly to the terms and spirit of our statute and the decisions under it, rather than to be drawn aside to consider the decisions of other states whose statutes may be similar or dissimilar to ours." The court then states the claim of the plaintiff in error to be "that here are five dwelling-houses, which, though contiguous to each other, are still in point of fact separate, distinct, and independent." But the court says: "We think that the plaintiffs in

these cases were entitled to a lien on the building on which they had labored and for which they had furnished materials, and on the whole building, and the land on which it stands." The whole point of the case is, that whereas the plaintiff in error claimed that here were five buildings within the intent and meaning of the statute, the court held that within such intent there was but one.

In the case before us, however, all that the plaintiff in error in the case cited claimed as a matter of construction is found as a matter of fact. The court, in its finding, says: "All of said dwelling-houses are separate and independent of each other in this respect, namely, that they are disconnected, the distance between No. 4, which was an old house upon the lot, and No. 3 being twelve feet; between No. 3 and No. 2, eleven and one half; and between No. 2 and No. 1, about fifty-two feet; and they are so constructed as to be adapted for separate and independent use; and each of said dwelling-houses constitutes a single and independent structure." It is further found that each of the three houses has, since completion, been occupied by two separate families. So that, in substance, the contention of the plaintiff in error in *Brabazon v. Allen*, 41 Conn. 361, is similar to a claim, if made here, that each of these houses constitutes two buildings, or that there are six instead of three. It is true that in the opinion in that case a quotation is made from the opinion in the case of *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325 (to which we shall next allude), in which the court says that the parties could not have contemplated a division or separation of the cost, but this remark, appropriate in the connection in which used, in a case where all the work was done upon a single principal building and such other subordinate buildings as can properly be held to be its appurtenances, where therefore a single lien is sufficient, can mislead no one who with the least care observes the context; and we have cited as fully as we have from *Larkins v. Blakeman*, 42 Conn. 292, to show that this court has always held that this consideration has no legal significance under any other circumstances. In *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325, a single lien was filed for work upon a dwelling-house and barn and one acre of land. It was held that this lien was valid, and embraced not only the buildings and the land covered by them, but also the land about the buildings, used with them, and necessary or reasonably convenient for their use, which in that

case was held to be the entire lot. This case was followed in *Fitch v. Baker*, 23 Conn. 563,—a case where a dwelling-house, barn, and privy were erected upon the same lot, and which illustrates, from another point of view, the doctrine that unity of contract is immaterial, since here were two separate contracts, one verbal and the other written. And very recently the principle upon which the case of *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325, rests has received fresh confirmation and full illustration by the case of *Lindsay v. Gunning*, 59 Conn. 296. That principle is of course one of construction of the statute, and is, that the out-buildings are dependencies of and appurtenances to the main building, and that the expression, "land on which the same may stand," is to be construed, not literally and strictly, which would render the lien useless, but reasonably, and that, as so construed, the term embraces "the building lot, or land about the buildings, used with them and necessary or reasonably convenient for their use."

The full and clear exposition of this principle is condensed on a single page of *Bank of Charleston v. Curtiss*, 18 Conn. 342; 46 Am. Dec. 325; and *Lindsay v. Gunning*, 59 Conn. 320, is only an application of that principle. The latter case is indeed said by this court to be "an extreme one." But it is so, not on account of any departure from such principle, but because, under the exceptional circumstances there existing, the court felt called upon to give to such principle an extended practical application. It is indeed stated that there is some ambiguity in the phrase quoted from the earlier case, and it is taken to have been intended in its broadest sense, and to mean "a quantity of land suitable or proportioned to the buildings, having regard to the purposes for which such land and buildings are ordinarily used"; or, as the reporter states it in the head-note: "The rule in determining what quantity of land should go with farm-buildings, in ascertaining the builder's lien for constructing them, is to ascertain the quantity of contiguous land that was intended should be used with them, and to which they are needful or useful." In other words, to borrow the idea and adapt the language of Judge Pardee in *Marston v. Kenyon*, 44 Conn. 355, all that was subjected to one use, as far as unity of use extended, embracing that, and only that, whose separation, by reason of its natural or designed connection, would impair the

value of the part which remained for the purpose for which it was constructed and thereby decrease its worth.

Applying these clear and reasonable rules of unity of structure or of use to the case before us (and no broader rules can, as it seems to us, be applied as rules of construction of the statute, on which alone the lienor's claim must depend,—a statute which this court again says, in *Lindsay v. Gunning*, 59 Conn. 318, in ascertaining whether a given case is within it, “will be construed with reasonable strictness”), it seems manifest that the claimed liens before us are not within it. Certainly, as we have already seen, there was no unity of structure. There was, not one building, but three. Nor were any of these buildings, in any sense, dependencies of or appurtenant to any other. There was, in no particular, unity of use. In *Chapin v. Persse and Brooks Paper Works*, 30 Conn. 461, 79 Am. Dec. 263, there was a semblance of such unity, but the court held that it was insufficient. Here there was no such semblance. It is true that the syndicate represented that “they were going to erect on said lot three dwelling-houses to rent,” and such was in fact their design. But the renting was not intended to be for one common purpose, employment, enterprise, or undertaking, to one tenant, but to three, or rather six. It is doubtless true, also, that each house enhanced the value of the lot, if by “lot” is understood the entire tract upon which they all stood, but such lot was capable of separation, and would naturally, sooner or latter, be separated into as many different lots as there were houses. Such separation would in no wise tend to decrease the value of any part; in fact, if it had any tendency at all, it would rather be to increase such value. There was nothing in common; only the expressed intent of the owners to rent them all separately. It might as well, for all purpose or semblance of unity of use, have been an intent to sell them all separately. The lot was indeed divided, for the purpose of description in mortgaging, so as to include with each house a separate house lot, and the finding says that “if said lot had been in fact divided in accordance with the boundaries given in said several mortgages, each lot would embrace all the land which is necessary for the use of the house standing thereon.” It seems to us that, under the circumstances disclosed, and in view of the decisions which we have reviewed, this finding is clearly decisive against the validity of the claims of the plaintiff and of the other claimants who were made parties.

The conclusion which we have reached renders the consideration of other questions presented, which relate to particular liens and to priorities, and to admission of evidence, unnecessary.

There is error in the judgment of the court below, and it is reversed.

CARPENTER, J. (dissenting). The majority of the court, in construing the statute relating to liens so as to deprive the claimants of the benefit of its provisions, has gone further in that direction, I apprehend, than the court has ever gone before. It may be that some expressions in the opinions in some of the cases give countenance to the position the court has now assumed. But I think that the logic of the facts in those cases, and the language of the court, when considered in connection with those facts, will hardly justify the conclusion drawn.

It will not be denied that in the earlier decisions the inclination of the court was to regard the statute as an innovation and somewhat inconsistent with natural right, and consequently to give it a rather rigid construction. On the other hand, it will be conceded that the tendency in more recent times has been to regard the statute with more favor, and give it a more liberal construction, so as fairly to effectuate its intention. I believe in a strict construction of the statute, so far as to require those who would receive its benefits to comply literally with all of its direct and positive provisions; for example, those relating to notices, the filing of the lien, the time when the same shall be done, and the like. But as to those parts of the statute which are less definite, and necessarily more general and comprehensive, a more liberal rule should prevail. The object, then, should be to construe the statute fairly and reasonably, so as to give effect to the intention of the legislature.

The statute is certainly indefinite in respect to the quantity of land and the number of buildings which may be covered by a lien; and that is the point involved in this case.

I am of the opinion that these liens should have been sustained, and I think that they would have been if the principles to which I have alluded had received their due weight in construing the statute and applying it to the facts of the case.

MECHANIC'S LIEN — CONSTRUCTION OF. — The lien of mechanics or material-men upon a building in the construction of which labor or material is used is created by statute, and such statute, being remedial, must be liberally construed: *White Lake Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262; *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84; *Connon v. Williams*, 14 Cal. 21. A substantial compliance with the statute regarding the contents of a claim of a mechanic's lien is sufficient: *Hagman v. Williams*, 88 Cal. 146. A mechanic's lien law is to be construed with reasonable strictness, since it gives preference to certain creditors by giving them a lien: *Chapin v. Perceé etc. Works*, 30 Conn. 461; 79 Am. Dec. 263, and note. No construction of purely statutory liens should be strained at in order to defeat them, but the rights of all parties should be harmonized and respected as far as is reasonably practicable: *Sheridan v. Cameron*, 65 Mich. 680.

MECHANIC'S LIEN — DIFFERENT BUILDING ON SAME LOT. — Where materials are supplied for a dwelling and stable on the same lot, a claim for materials furnished for the dwelling, but not including the stable, will not authorize a recovery for the materials furnished for the stable, though it is appurtenant to the dwelling: *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529. Where material is furnished under an entire contract for the erection of several buildings for the same person on the same lot of land, the lien attaches upon the whole as an entirety for the gross value of the material furnished: *Glass v. St. Paul Carriage etc. Co.*, 43 Minn. 228; *Laz v. Peterson*, 42 Minn. 214. Where two buildings are erected for the same owner on separate lots owned by him, it is not necessary, in the petition to foreclose a mechanic's lien, to set out a bill of particulars showing the materials were furnished for each building separately: *Bowman Lumber Co. v. Newton*, 72 Iowa, 90. A joint lien may be filed against two separate buildings on the same lot for labor and materials, though erected at different times and under different unrecorded contracts between the same owner and the same original contractor: *Beeth v. Pendola*, 88 Cal. 36.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

GARNER v. STATE.

[28 FLORIDA, 112.]

TRIAL — MOTION FOR CONTINUANCE. — Failure to assign a ruling denying a motion for a continuance as a ground on motion for a new trial is not a waiver or abandonment of an exception taken to such ruling.

TRIAL — MOTION FOR CONTINUANCE — DISCRETION OF COURT. — A motion for a continuance, on the ground that the counsel for the accused is too ill to properly conduct the defense, rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, in the absence of an abuse of its discretion.

HOMICIDE — EVIDENCE — THREATS, WHEN ADMISSIBLE. — Threats are admissible in evidence in criminal cases when they are part of the *res gestæ* or when there is doubt as to who began the fatal difficulty, whether they were conveyed to the defendant or not. In all other cases, threats previously made by the deceased, whether communicated to the defendant or not, are not admissible, unless the evidence tends to show that the deceased, at the time of the killing, had in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration or overt act of attack toward the accomplishment or consummation of such threats.

HOMICIDE — THREATS AS EVIDENCE. — To make threats of the deceased admissible in cases of homicide in connection with an overt act, the proof must show such a demonstration of an immediate intention to execute the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer serious bodily harm if he does not take the life of his adversary. It must be such an act as is reasonably calculated to induce the belief that the execution of the threatened attack has actually commenced, and the circumstances of the killing must be such as tend to raise or support a case of self-defense.

HOMICIDE — THREATS AS EVIDENCE — QUESTION FOR COURT. — In cases of homicide, the question of the admissibility of threats by the deceased is one for the court to decide, and if there is the slightest evidence tending to prove a hostile demonstration which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or

sustaining great bodily harm, the threats should be admitted. They should also be admitted when any doubt exists in the mind of the court as to whether or not the alleged demonstration, considered in connection with such threats, would be sufficient to cause a man of ordinary prudence to reasonably believe himself to be in danger of his life or of great bodily harm. They should be excluded when there is no proof of any act tending to cause such person to reasonably entertain such a fear.

HOMICIDE — THREATS AS EVIDENCE — WEIGHT OF, QUESTION FOR JURY. —

When, in cases of homicide, the court has admitted threats uttered by the deceased in evidence, it is for the jury to determine, after considering all the evidence, whether or not the accused had even apparently reasonable grounds for believing that he was in imminent danger of death or of great bodily harm at the time the killing was done.

HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED, WHEN ADMITTED. —

In cases of homicide, evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that the defendant acted in self-defense, or under such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or of suffering great bodily harm at the hands of the deceased; but it is not admissible for this purpose except when it explains or gives meaning, significance, or point to the conduct of the deceased at the time of the killing, and such conduct must be shown before the auxiliary evidence of such character can be introduced. To admit such evidence, there must be some act on the part of the deceased which, though considered independent of his dangerous character would be regarded as innocent or harmless, may arouse a reasonable belief of imminent peril to life or limb, when received and considered in connection with or illustrated by such character.

HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED, WHEN NOT ADMISSIBLE. —

In cases of homicide, where there is no evidence tending to show that the killing was done in self-defense, or any conduct on the part of the deceased from which, assuming him to have been a violent and dangerous man, any inference can reasonably be drawn that he intended the immediate perpetration of an act imminently dangerous to the life of the accused or of serious bodily harm to him, evidence of the violent and dangerous character of the deceased is not admissible.

HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED — FUNCTIONS OF COURT AND JURY. —

The admissibility of evidence of the violent and dangerous character of the deceased in cases of homicide is for the court to determine, and its weight, when admitted, is for the jury, under all the evidence in the case.

HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED — GENERAL REPUTATION. —

In cases of homicide, proof of the violent and dangerous character of the deceased can only be made by evidence of his general reputation in the community for such character, and not by evidence of specific acts or general bad conduct.

CRIMINAL LAW — RECORD OF OATH ADMINISTERED TO JURY — SUFFICIENCY OF. —

Where the record in a criminal case purports to recite the oath as it was in fact administered to the jury, and such oath appears to be substantially different from that prescribed by law, the verdict must be set aside and the judgment reversed; but when the record does not so purport, but merely imports that the jurors were in fact sworn, without negating the presumption that they were duly sworn, the entry is suf-

ficient, and in better form than if the prescribed oath were recited word for word.

CRIMINAL LAW — SUFFICIENCY OF RECORD OF OATH ADMINISTERED TO JURY.

— When the record entry in a criminal case merely recites that the jury was “duly sworn” to try the issue, it only purports to state, and is intended to state merely, that the jury was sworn according to the formula prescribed by law for all similar cases, and it is sufficient without reciting such formula in full.

TRIAL — INVASION OF PROVINCE OF JURY. — Remarks made by the court, in the trial of a case, as to the credibility of a witness, or as to the weight of any evidence relevant to the issue, however inadvertently they may have been made, are an improper infringement upon the province of the jury, and, when duly excepted to, are grounds for assigning error by the party prejudiced. The court may pass upon the admissibility of evidence, but, when admitted, its credibility and weight are questions for the jury.

HOMICIDE — INTOXICATION AS DEFENSE. — Voluntary intoxication, as distinguished from a state of fixed and settled frenzy or insanity, either permanent or intermittent, does not excuse homicide or any other crime which, but for intoxication, would be criminal, although the immediate effect of the intoxication is to render its subject unconscious, for the time, of what he is doing, or temporarily insane. This rule applies whenever the doing of the wrongful act voluntarily constitutes the crime, or a particular or specific intent is not an essential element of the offense; and in all such cases a person who is, at the time of the commission of the crime, unconscious or insane as the immediate consequence of the voluntary intoxication is liable in the same manner and to the same extent that he would be if sober.

CRIMINAL LAW — INTOXICATION AS DEFENSE TO CRIME. — Whenever a specific or particular intent is an essential element of a crime, voluntary intoxication may be considered with reference to the capacity or ability of the accused to form or entertain the particular intent, or upon the question whether or not the accused was in such a condition of mind as to form a premeditated design; for when a party is so intoxicated as to be unable to form or entertain the essential intent, such intent cannot exist, and no crime to which it is necessary can be perpetrated.

HOMICIDE — MURDER IN FIRST DEGREE — INTOXICATION AS DEFENSE. — When a premeditated design to effect the death of the person killed is essential to the crime of murder in the first degree, voluntary intoxication may be considered by the jury as affecting the capacity of the accused at the time of the killing to form such design; and if the accused, at the time of the killing, was so much intoxicated as to be incapable of forming a premeditated design to take human life, he cannot be convicted of murder in the first degree.

HOMICIDE — INTOXICATION AS DEFENSE. — Voluntary intoxication, and the effect thereof, will not render that a sufficient provocation to reduce a killing to manslaughter which would not be so in the absence of such intoxication; and, as between murder in any degree below the first and manslaughter, such intoxication plays no part, the only purpose for which it is admissible being to show an absence of a premeditated design or that the killing was not murder in the first degree. The only effect of proof of intoxication, such as rendered the accused incapable of a pre-

meditated design to kill, will be to reduce the killing to murder of the second or third degree, according to the circumstances.

HOMICIDE — INTOXICATION AS A DEFENSE. — Where one becomes voluntarily intoxicated for the purpose of carrying out a preconceived design to take human life, his intoxication at the time of the killing is no defense.

HOMICIDE — INTOXICATION AS A DEFENSE — INSTRUCTIONS. — To instruct the jury that the law presumes that a person who is sober enough to form an intention to shoot another, and actually does kill him without justification or excuse, is sober enough to form a premeditated design to kill the person shot, and that in such case the person shooting is criminally liable for his act, is erroneous; for while the law presumes a sober man to intend what he does, it does not presume a killing with a premeditated design. This, like every other element of the crime, must be proved.

HOMICIDE — INSTRUCTIONS UPON SELF-DEFENSE in murder cases should give the accused the benefit of a reasonable fear of death or of great bodily harm from the deceased.

HOMICIDE — INSTRUCTIONS AS TO RECOMMENDATION TO MERCY. — In cases of murder, the court, when charging the jury as to a verdict of guilty, with a recommendation to the mercy of the court, should give the terms of the statute, with the information that making or withholding the recommendation is a matter which is entirely within the discretion of a majority of the jury-men.

INDICTMENT for murder. The defendant, Garner, who was intoxicated, went into a room where Lasley, the deceased, and four others were congregated, and picked up a glass and threw it out of a window. One of the proprietors of the place then said to him: "What in the deuce do you mean?" The deceased, who was in his shirt-sleeves and unarmed, ran toward the accused and put his hands on his shoulders. The defendant backed toward the door, the deceased still holding him, and when they reached the door, defendant fired a pistol which he carried in his belt, in open view, the ball striking the deceased in the abdomen, and shortly afterwards the defendant fired three other shots at the deceased, some of which took effect, causing his death. There was evidence as to previous threats made by the deceased against defendant, and as to whether or not the former put his hand on his hip pocket before the first shot was fired. The remaining facts are stated in the opinion. Defendant was convicted, and appealed.

J. S. White, for the plaintiff in error.

W. B. Lamar, for the state.

RANEY, C. J. The defendant was convicted of murder in the first degree, in February last, in the circuit court of Suwannee County.

1. The first error assigned is the "overruling of the defendant's motion for a continuance, and forcing him to trial while his attorney was too sick to properly conduct the defense."

The bill of exceptions shows that on the eighteenth day of February, L. B. Clifton was, on the application of counsel on both sides, sworn as stenographer, and the state attorney announced ready, and in answer to a question whether the defendant was ready to proceed, Mr. Grant, defendant's counsel, stated that he had not yet been furnished with a copy of the indictment, and the names of the special *venire* summoned in the cause, and demanded that he be now furnished with them. The court directed the clerk to furnish them, and suspended further proceedings in the case until it was done, giving an hour's time. At the expiration of the hour, when this had been done, Mr. Grant, being asked if he was now ready to proceed, made a motion for a continuance, stating, in his place at the bar, that he was sick and unable to conduct the case, and that he was sole counsel in the cause. To this motion the court responded, stating, in substance, that on the tenth day of the month the case was sounded and set for the eighteenth day, and under that agreement the state's witnesses were discharged till the 18th; and that on the 17th, at noon, during a trial of a murder case in which Mr. Grant was counsel for the defendant therein, the court was moved for a special *venire* to try the present cause, the defendant being in court; that no objection was then made to going into the case, nor any intimation given of any physical inability upon the part of counsel; that the court, on the 17th, after conferring with the sheriff and clerk, and asking the opinion of Mr. Grant—which he declined to give, ordered a special *venire* of fifty talesmen. The court further observed that 146 names had been drawn from the box prior to this order, which, with these 50, would leave only 96 to serve during the next "year"; that he thought it was the duty of the counsel, "on yesterday, when this question was brought up, and the court distinctly stated that he would not summon the special *venire* if the case was not ready for trial. No objection was made on the ground of physical disability, and the order was made, and has been executed by summoning the talesmen who are now present in court. If Mr. Grant has since been taken sick, so as to render it unsafe for him to represent his client, that fact would appeal to the court and to the state attorney, but there is no evidence here, nor certificate of any physician, nor does Mr. Grant make

an affidavit himself." The court further stated that he would give counsel an opportunity to present a certificate, and would also order a personal examination of counsel, and notified both client and counsel that if the latter was physically unable to conduct the case, that the former must obtain additional counsel, and then gave counsel until "two o'clock" to amend his motion as he might deem proper, and appointed Drs. Carroll and Overstreet to make a personal examination and report to the court, and notified the prisoner that he must secure additional counsel if the report showed his counsel's "inability." To this ruling counsel excepted. Mr. Grant, after a recess, presented his affidavit and asked that it be filed. This affidavit is to the effect that he was "the only counsel in the case," and that he "is physically unable, on the trial of said cause, to properly represent the said I. T. Garner as his counsel." A report signed by Drs. Airth and Carroll was also filed, which is as follows: "We hereby certify that we have carefully examined D. F. Grant with reference to his physical condition and general health, and we find him convalescing from an attack of the grippe. Mr. Grant is not in a prime condition of health, although not, in our opinion, entirely incapacitated," etc. The court then observed that it was advised and knew that on yesterday Mr. Grant made an able defense in a capital felony case; that he came into court this morning and entered into the defense of a client charged with a felony with his usual skill, and that after the special talesmen were in court and this case sounded for trial, and after being present last week and this week in court, he then, at the last moment, this morning, asked for copies of the indictment and venire, thus delaying the court for an hour, and he also consented with the state attorney to employ a stenographer to take the testimony, who was sworn in in his presence before the motion for a continuance was made; also, that it had "come to the knowledge of the court that Major Gallaher has been employed to assist in the defense." The court then denied the motion, stating that upon the completion of the jury the case would be adjourned until to-morrow, so as to give Mr. Gallaher an opportunity of conferring with his witnesses and other counsel. To this ruling counsel for defendant excepted, and Mr. Grant then offered a certificate of a doctor in reference to the sickness of a witness for defendant, announcing that his purpose was to learn if the certificate was sufficient to excuse the witness from coming, the court answering that it was not,

and that if the counsel wished an attachment, to which counsel replied that he would telegraph for him, and thought he would come.

The failure to assign this ruling as a ground in the motion for a new trial was not a waiver or abandonment of it: *Du Puis v. Thompson*, 16 Fla. 69; *Parrish v. Pensacola etc. R. R. Co.*, 28 Fla. 251. A question of this kind rests in the sound discretion of the trial court, yet an appellate court would not hesitate to interfere, where it was shown that such discretion had been exercised to the injustice of the prisoner, or been abused: *Newberry v. State*, 26 Fla. 334. It is apparent that the judge did not participate in counsel's distrust of his physical ability to properly represent his client, and it is evident that he did not think there had been any such change in his physical condition since the order of the 17th of February for the special *venire* as impaired the professional qualifications he had exhibited throughout the week preceding and up to the motion for a continuance. Such a change, it is true, might have taken place since such order, and even just before the entry of the motion, and the circumstances of a case might be such that it would be a great wrong, in fact a patent denial of justice, to a client to force him to employ new counsel unacquainted with the facts and uninformed by due study of the proper defense to be made, and to an immediate trial, or to one even during the term. Under such circumstances, of course, the question of the issue and service of the special *venire*, the presence of the talesmen, the number of names in the jury-box, and everything incidental to such questions would be entirely subordinate to the rights of the accused, whose justice and fair trial, and not the convenience or gain of his counsel, are the objects to be secured or kept from harm. But here no such change in condition is exhibited, nor does the showing made present any other facts which authorize our interference. Mr. Grant's affidavit is merely a general statement of his physical condition, and though made after the court's suggestion as to the possibility of any such change subsequent to the issue of the *venire*, he does not mention anything on this point, nor does he state any substantive fact upon which the judgment of an appellate court could act in forming a conclusion as to a person's physical condition; and besides this, the report of the physicians, whatever weight should be attached to it as evidence, is so indefinite as to leave us uninformed as to his exact *status* between the ex-

tremes of "prime condition" and of being "entirely incapacitated." Considering these features of the application, and what Mr. Grant had been able to do prior to the motion, and that, as the bill of exceptions show, he continued in the defense of the cause, examining and cross-examining all the witnesses, with one or two exceptions, and that no attempt is made to designate any particular wherein the defendant has suffered, and that no such claim was made on the motion for a new trial, we are forced to conclude that no injustice was done the prisoner or his counsel, nor any judicial discretion violated, in overruling the motion for a continuance.

2. The second, third, and fifth assignments of error involve questions as to the admissibility of evidence of threats by the deceased against the defendant, and of the violent and dangerous character of the deceased.

Threats are admissible when they are part of the *res gestæ*, or when there is doubt as to who began the fatal difficulty, and it is not material, in either of these cases, that they should have been previously conveyed to the defendant: *Bond v. State*, 21 Fla. 738, 751, 752, and authorities cited; *Myers v. State*, 62 Ala. 599. Except in the above instances, threats previously made by the deceased, whether communicated to the defendant or not, are not admissible, unless there is testimony which at least tends to show that the deceased, at the time of the killing, had in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration or overt act of attack towards the accomplishment or consummation of such threats. There must be, at least apparently, such a demonstration of an immediate intention to execute the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer serious bodily harm if he does not immediately take the life of his adversary. It must be such an act as is reasonably calculated to induce the belief that the execution of the threatened attack has been actually commenced: *Bond v. State*, 21 Fla. 738, 751, 752; *Myers v. State*, 62 Ala. 599; *Smith v. State*, 25 Fla. 517; *Evans v. State*, 44 Miss. 762; *Payne v. State*, 60 Ala. 80; *Campbell v. People*, 16 Ill. 17; 61 Am. Dec. 49; *Irwin v. State*, 43 Tex. 236; *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250; *Pond v. People*, 8 Mich. 150. The circumstances of the killing must be such as tend to raise or support a case of self-defense. There must be, at least apparently, a hostile demonstration or

overt act of attack tending to show that the accused was in such imminent danger.

The question of the admissibility of threats is one for the court's decision. If there is the slightest evidence tending to prove a hostile demonstration which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm, the threats should not be excluded: *Roberts v. State*, 68 Ala. 156; *Dupres v. State*, 33 Ala. 380; 73 Am. Dec. 422; *Horbach v. State*, 43 Tex. 242; *Holly v. State*, 55 Miss. 424; *Spivey v. State*, 58 Miss. 858; *Russell v. State*, 11 Tex. App. 288. They are admissible because they serve to explain the demonstration or overt acts which is the predicate for their introduction, and to show the reasonableness of the accused in believing himself in that danger which justifies the taking of human life. It is, however, not to be forgotten that the weight of such threats, considered in connection with the alleged overt act, is, as is the credibility of the witnesses testifying to either such act or threats, a question for the jury: *Myers v. State*, 62 Ala. 599; *Pridgen v. State*, 31 Tex. 420; *People v. Ractor*, 19 Wend. 589; *Howell v. State*, 5 Ga. 54. The admission by the court of either the one or the other implies nothing as to its truthfulness or weight. The court discharges its delicate functions in admitting or excluding the threats; and it should admit them even where its mind is in a state of doubt whether or not the alleged demonstration, considered in connection with such threats, would be sufficient to cause a man of ordinary prudence to reasonably believe himself to be in danger of his life or great bodily harm, for all such doubts are to be solved in favor of the accused: *Holly v. State*, 55 Miss. 424; and will not exclude them except where there is no proof of any act tending to cause such a person to reasonably entertain such a fear: *Bond v. State*, 21 Fla. 738, 751, 752; *Smith v. State*, 25 Fla. 517; *Holly v. State*, 55 Miss. 424; *Payne v. State*, 60 Ala. 80; *Birfield v. State*, 15 Neb. 484; but when the court does admit them, it is for the jury to say, after considering all the testimony, whether or not they believe the accused had even apparently reasonable grounds for believing that he was in imminent danger of life or great bodily harm, and the court is not responsible for the manner in which juries discharge this function.

Evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that a defendant has acted in self-defense; or in other words, under

such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased; but it is not admissible for this purpose except where it explains or will give meaning, significance, or point to the conduct of the deceased at the time of the killing, or will tend to do so; and such conduct of the deceased at the time of the killing, which it is proposed thus to explain, must be shown before the auxiliary evidence of such character can be introduced: *Horbach v. State*, 43 Tex. 242; *Hudson v. State*, 6 Tex. App. 573; 32 Am. Rep. 593; *Franklin v. State*, 29 Ala. 14; *Eiland v. State*, 52 Ala. 322; *Roberts v. State*, 68 Ala. 156. There must be, upon the part of the deceased, some demonstration which, though considered independent of the dangerous character of the deceased it would be regarded as innocent or harmless, when received and considered in connection with or illustrated by such character, may arouse a reasonable belief of imminent peril of the kind indicated above: *Hudson v. State*, 6 Tex. App. 573; 32 Am. Rep. 593; *Spivey v. State*, 58 Miss. 858; *State v. Robertson*, 30 La. Ann. 340; *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250. Where there is no evidence tending to show that the killing was in self-defense, or any conduct upon the part of the deceased from which, even assuming that he is a violent and dangerous man, any inference can reasonably be drawn that he intended the immediate perpetration of an act imminently dangerous to the life of the accused or of serious bodily harm to him, the testimony is inadmissible. In such cases there is no conduct to be illustrated or explained by the character under discussion: *Bond v. State*, 21 Fla. 738, 751, 752; *Irwin v. State*, 43 Tex. 236; *Hudson v. State*, 6 Tex. App. 573; 32 Am. Rep. 593; *Bowles v. State*, 58 Ala. 335; *Eiland v. State*, 52 Ala. 322; *Franklin v. State*, 29 Ala. 14; *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250; *People v. Edwards*, 41 Cal. 641; *State v. Hicks*, 27 Mo. 589; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162. The admissibility of the evidence is not confined to cases in which there is doubt of the guilt of the accused, or of the degree of the homicide, or that the killing was in self-defense: *Eiland v. State*, 52 Ala. 322; *Franklin v. State*, 29 Ala. 14; *Horbach v. State*, 43 Tex. 242. If there is at the killing any demonstration upon the part of the deceased which his dangerous character would reasonably and naturally aid, explain, or give point or significance to as tending to make

out a case of self-defense upon the part of the accused, evidence of such character should be admitted. The philosophy of the introduction of this kind of evidence is founded in human nature. Though in the eyes of the law it is no less a crime to kill a brutal, dangerous, or otherwise bad man without apparent cause for reasonable belief upon the part of the slayer of imminent danger to his life or of serious bodily harm, creating an immediate necessity for the killing, yet the same menacing demonstration which, made by a man of peaceable and law-abiding character, would suggest no sense of danger, would, when made by one of a violent and dangerous nature, reasonably and naturally arouse genuine feelings of imminent danger to life or of great bodily harm. Men who are assailed act, in defending themselves, with promptness and force in proportion to the violent and dangerous character of the assailant. The law, in deciding whether or not a person has, in slaying another, acted under a reasonable belief that he was in imminent danger of life or great bodily harm, considers all the circumstances, and among others the dangerous character of the deceased, when it is, by the circumstances of the killing, rendered admissible in evidence, or becomes a part of the *res gestæ*, as it is and does where it illustrates the conduct of the deceased. The accused is entitled to have the jury see all the circumstances as they existed, and to judge him accordingly. This they could not do if in such cases the dangerous character of the deceased was kept from them: *Horbach v. State*, 43 Tex. 242; *State v. Bryant*, 55 Mo. 75, 78, 79; *State v. Keene*, 50 Mo. 357; *State v. Hicks*, 27 Mo. 588; *Hurd v. People*, 25 Mich. 405; *Monroe v. State*, 5 Ga. 85, 137; *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250. What has been said above as to the respective functions of the court and jury is applicable also in this connection.

Proof of the character in question is to be made by evidence of the deceased's general reputation in the community for such character, and not by evidence of specific acts or general bad conduct: Wharton's Crim. Ev., secs. 57, 58; *Wesley v. State*, 37 Miss. 327; 75 Am. Dec. 62; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *Dupres v. State*, 33 Ala. 380; 73 Am. Dec. 422.

An application of these principles to the facts of the case is necessary. D. F. Grant, a witness for the accused, was asked whether he knew of Lasley's making any threats in reference to taking defendant's life within a few days prior to the killing, and if these threats were communicated to defendant. The

state objected, and the court sustained it, on the ground that there had been no overt act proved which would cause the defendant, as a reasonable man, to believe his life in danger, and stating "that the only remark that would indicate that there was any trouble was when the deceased, on Garner's coming into the store with a pistol in his waist-band, said to him: "Pete, that is the way to carry them,—not concealed." No exception was taken to this ruling. Counsel for the prisoner then announced that he proposed to ask the witness: "Did you see Mr. Lasley engaged in loading that gun—a Winchester rifle—in his office? and if so, what did he say he was loading the gun for, and what he intended to do with it after he had loaded it?" In reply to a question by the court, counsel stated that this question was propounded for the purpose of proving threats, and thereupon the court sustained the objection of the state to the question, and the defendant excepted to the ruling. The prisoner also offered to prove, by one Lassiter, that Lasley said that Garner had thrown a beer-bottle through the window of his office, and that if the damned town council did not arrest and fine him, he (Lasley) would wait till twelve o'clock, and then kill him himself, and that this conversation occurred some four or five days before the killing; and by one Thurman, that Lasley was a man of very violent character, and that he had previously killed two men; and by D. F. Grant, that four or five days before the killing, he (Grant) entered the office of Lasley, and found him engaged in loading a repeating rifle, and that Lasley said to Grant: "See what they have done [pointing to a hole in the window pane], and I am fixing for them, and am to get them," and that Grant, becoming apprised that Garner had thrown a beer-bottle through the window, told him that he had better arrange the matter with Lasley, or keep on his guard. The state objected to these several matters, and the objection was sustained, and the ruling excepted to.

There were subsequent renewals of these offers of testimony, and exceptions to the court's rulings refusing to admit the evidence.

In view of the testimony of Winburn as to the position of Lasley at the time the first shot was fired, which was, that he had his left hand on Garner, and it seemed, to the best he could tell, his right hand behind him as if putting it in his hip pocket, we think the circuit judge erred in refusing to admit the testimony of the deceased's threats, and of his repu-

tation as a man of violent and dangerous character. It is true there is a positive conflict between Winburn and the state's witnesses as to whether the pistol was fired at all in the house. The latter state, in effect, that the accused was outside when he fired the first and subsequent shots, but Winburn says that two shots were fired inside, and in this statement he is sustained by Lassiter; but neither we nor the circuit judge have, in so far as the admissibility of testimony as to threats and character is concerned, anything whatever to do with the question of the credibility or weight, or relative credibility or weight, of the testimony of these witnesses. Winburn's testimony is to be dealt with, in this connection of the admissibility of evidence as to threats and character, upon the assumption that the jury may believe it; and viewed in this aspect, it cannot be said that there was not any or the slightest testimony tending to show that the accused had reasonable cause to believe himself in the danger specified above as being necessary to its admissibility; or in other words, that there was no testimony of any act or conduct upon the part of deceased which previous threats would explain or show the *quo animo* of, or a violent and dangerous character would illustrate or give significance to: *Fitzhugh v. State*, 13 Lea, 258. The mistake which, to our minds, the circuit judge has fallen into is in not distinguishing between the admissibility and weight of evidence. Whether or not, considering the conduct or act of the deceased testified to by Winburn in connection with any evidence of threats or of violent and dangerous character, or both, that may be testified to, there was, in view of the whole testimony or all the circumstances of the killing, reasonable ground, either really or apparently, for the accused to believe that he was in imminent danger of losing his life or receiving great bodily harm at the hands of the deceased unless he then and there took his life, is a question for the minds and consciences of the jury in judging between the prisoner and the state: *Wood v. State*, 92 Ind. 269, 274, 275. The admission of the evidence that may tend to prove a conclusion is never an intimation that such conclusion has been or will be proved. Our system of jurisprudence denounces any such intimation by the court, and of course ignores any unjustifiable inference by the jury of such intimation upon the part of the court in admitting evidence. After carefully considering the entire evidence as to the circumstances of the killing, — the substance of which is given in the statement of the case, — we find

nothing in it justifying a different conclusion as to the admissibility of evidence of threats by the deceased, and of his reputation as a person of violent and dangerous character.

Evidence that the deceased had previously killed two men, or any one, or any evidence of specific acts or general bad conduct, is, upon principles announced above, inadmissible: *Fitzhugh v. State*, 13 Lea, 258.

3. It appears from the record that the state requested that the testimony of Winburn taken before the coroner should be turned over to the stenographer, to be attached to the record, and it was ordered accordingly. After it had been turned over to the stenographer, the defendant objected, on the ground that the proof showed that it was not the work of a judicial officer, but by a mere outsider. The ruling on this objection and the exception thereto, as shown by the bill of exceptions, are as follows: "On the cross-examination of the witness Winburn on yesterday, he was asked by the state attorney if he had been a witness at the coroner's inquest, and asked some questions showing a discrepancy between his testimony there and here. Counsel for defendant then objected to that manner of interrogating the witness, and claimed that all of his evidence as given before the coroner should be read over to him before he should be crossed upon it. The court ruled that that was proper, and the testimony was so read to him. The court now rules that for the purpose of identification of that paper in connection with the cross-examination, that it may be filed with the stenographer. To which ruling of the court, defendant, by his counsel, excepts."

It also appears, that immediately after this ruling the counsel for the prisoner proposed that he should be allowed (inasmuch as the state's witness Spence had stated, in his evidence, that two or three days before the killing, the defendant had said in his presence that the deceased accused defendant of throwing a beer-bottle through deceased's window, and that he, defendant, was getting damned tired of it, and that it had to be stopped) to prove by Grant and Lassiter that the deceased, four or five days before the killing, had accused the defendant of throwing such a bottle through the window of his office, and had said that he was loading his Winchester rifle to shoot the defendant with, and that they informed the defendant of such threat before the killing. The state objected, and the court ruled as follows: "The question of the admissibility of evidence of threats is the question before the court;

as to whether threats ought to be admitted, — threats of the deceased towards the accused. Now, it is insisted that inasmuch as the state has proven expressions of bad blood on the part of the defendant, growing out of an alleged accusation, that therefore defendant should be allowed to prove that it was true that such an accusation was made, and that it was coupled with threats of violence. The question as to the admissibility of threats, says our supreme court in the very elaborate opinion, does not depend upon the right of the accused to explain why he made threats, but it depends upon whether, at the time the homicide was committed, they were admissible to show that he had a reasonable apprehension to believe that he was then and there in danger; and the supreme court has held that although he may have had these threats communicated to him, — threats of great personal violence, even closer in time than you went, — that unless there was some overt act indicative of the intention or design to carry those threats into execution, then those threats would not be admitted. They say that from all the circumstances, all the surroundings, that if there was not apparent real danger at the time of the homicide, then previous threats by the deceased cannot be admitted. Now, you take the circumstances of this case, — I need not recite them; I do not desire to harrow the feelings of this poor young man, — but was there, to a prudent and cautious man, such apparent danger to him, coupled with these circumstances and surroundings, as would justify him in slaying Lasley as was done, — such apparent danger to his life or person as would justify the killing?" This was followed by a reference to a ruling made by the judge in a case in Hamilton County, and the overruling of the application for admission of the evidence, and an exception to such ruling.

It is contended by counsel for plaintiff in error that language used by the judge as to questions showing a discrepancy between Winburn's testimony before the coroner's jury and that on the trial was calculated to impress the jury with the idea that the judge was intimating that Winburn had lied on one of the occasions, or to at least discredit him with the jury, and that the discrediting effect upon the minds of the jury of this language as discrediting Winburn was "cemented" by the language used in the subsequent proceedings in deciding that no overt act had been proved. We are entirely satisfied that remarks made by a judge in trial of a cause as to the credibility of a witness, or as to the weight of any evi-

dence relevant to the issue, however inadvertently they may have been made, are an improper assumption of or infringement upon the province of the jury, and when duly excepted to are grounds for assigning error by the party to whom they may seem prejudicial, and of reversal. It is the province of the court to pass upon the admissibility of evidence, but when it is in, its credibility and weight are questions for the jury. The guaranty which our statute gives against the court throwing the weight of its opinion as to any question of fact when charging a jury would be of little or no benefit to litigants if judges were at liberty to intimate the same opinions in making rulings, or otherwise, in the progress of a cause. The policy of our jurisprudence is, that the jury shall decide all such questions of themselves, and entirely liberated from the influence of an intimation of the judge's impressions: *Thompson on Trials*, secs. 218, 219; *Proffatt on Jury Trials*, secs. 322-324; *State v. Harkin*, 7 Nev. 377; *State v. Tickel*, 13 Nev. 502; *McMinn v. Whelan*, 27 Cal. 300; *Gibson v. State*, 26 Fla. 109; *State v. Parker*, 66 N. C. 624; *Commonwealth v. Foran*, 110 Mass. 179; *Foust v. Yielding*, 28 Ala. 658; *Sims v. State*, 43 Ala. 33; *Williams v. State*, 47 Ala. 659; *Walker v. State*, 37 Tex. 366; *State v. Baker*, 8 Md. 44.

We do not think the remark of the judge as to the question propounded to Winburn can fairly be regarded as one concerning his credibility or the weight of any evidence; it is, we think, only a statement of the purpose of the questions propounded by the state attorney, and being such, it was not objectionable.

Our views as to what was said by the judge as to there being no evidence of an overt act have been foreshadowed by our conclusions, already announced, as to the admissibility of evidence as to threats and character. Had there been no evidence whatever tending to prove an overt act, no harm could have resulted from his observations: *Metzger v. State*, 18 Fla. 481. But there was such evidence, and where there is evidence tending to support an issue, it must be left to the jury: *State v. Allen*, 3 Jones, 257; *Williams v. State*, 47 Ala. 659; *Walker v. State*, 37 Tex. 366.

Whether or not an exception simply to the "ruling" or "decision" of a judge is sufficient to support objections to language or observations having a tendency to influence the jury in the manner indicated above, we do not now decide, it being unnecessary, as the case has to go back for a new trial on other

points. It is certainly better, and is due the court, and may be indispensable, that the specific objection of the tendency to such influence should be made.

4. It is also assigned as error that the jury was not sworn in accordance with the requirement of the statute. The record, as shown by the transcript before us, after stating that the prisoner was arraigned and pleaded not guilty, states: "Whereupon came the following jurors [naming them], who were duly selected, chosen, impaneled, and sworn to try the issues joined." The statute (McClellan's Digest, sec. 12, p. 447) provides that in capital cases the following oath shall be administered: "You shall well and truly try, and true deliverance make between the state of Florida and the prisoner at the bar, whom you shall have in charge. So help you God." The oath prescribed by the same section for cases not capital is: "You shall well and truly try the issue between the state and prisoner at the bar according to the evidence. So help you God."

No objection was taken to the oath at the time of its administration, nor, we may remark, at any time, in the lower court. The rule in civil cases is, that the objection should be made at the time the oath is administered, and cannot be made primarily in the appellate court: *Seymour v. Purnell*, 23 Fla. 232; *Jacksonville etc. R'y Co. v. Neff*, 28 Fla. 373. If the record in a criminal case purports to recite the oath as it was administered, and the oath appears to be substantially different from that prescribed by law, it seems that a reversal will result; on the other hand, if the record does not so purport, but merely imports that the jurors were in fact sworn, without negating the presumption that they were duly sworn, the entry is sufficient, and in better form than if the prescribed oath were recited word for word: Thompson and Merriam on Juries, secs. 298, 299, and authorities *infra*. The contention of counsel for plaintiff in error is, that the record in this case does purport to give or recite the oath administered, and he is not without authority to sustain his position. Upon principle, and what we deem the better authorities, our opinion is, that the entry here should not be thus construed. It is not the duty of the clerk in writing up the minutes or the record of the proceedings of a trial to incorporate the form of the oath administered to the jurors; no more is necessary, or really proper, than to make the record show that the jury were in fact sworn according to law: *Mitchell v. State*, 58 Ala. 417; *Dyson v. State*,

26 Miss. 362; Thompson and Merriam on Juries, sec. 299. In England, though the form of the oath in criminal cases was, and is now, so far as we know: "You shall well and truly try, and a true deliverance make between our sovereign lord the king [or lady the queen] and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God": 1 Bishop's Crim. Proc., sec. 983; *Patterson v. State*, 7 Ark. 59; 44 Am. Dec. 530; *State v. Jones*, 5 Ala. 666, 673,—yet, as to the point in question, the form of entry in even a murder trial was: And the jurors of the said jury, by the said sheriff for this purpose impaneled and returned, to wit [naming them], being called, come, who, being elected, tried, and *sworn to speak the truth of and concerning the prisoner*, upon their oath say": 4 Bla. Com., Appendix; *State v. Pearce*, 14 Fla. 153. It is apparent that no part of this entry was intended as a recital of the above oath, but that the Italicized words were meant only as a form of stating that the jurors were duly sworn. There is no statute or rule of practice in our state making any change in the purpose of this record entry. The record entry is not intended to show how the jurors were sworn, but merely to show that they were actually sworn, and the presumption is, as it is to all similar proceedings, that the swearing was legally done, unless the record shows the contrary, and overcomes the presumption. If any exception is taken at the time to the manner in which the swearing is done, which swearing is always done orally in the presence of the court, the prisoner, and the counsel of both parties, the proper mode of preserving and manifesting the form and manner of doing it, and the exception thereto, is a bill of exceptions: *Dyson v. State*, 26 Miss. 362; and in the absence of such a bill of exceptions, it will be presumed, as in other matters *in pais*, that there was no error in doing it, unless the solemn record of the court shows expressly that there was error. Upon the same principle, the entry of a judgment recites, *inter alia*, that the jury heard the evidence, yet if it is desired to preserve or show what the evidence was, and any ruling and exception as to it, a bill of exceptions is the only proper method of doing it. The real function of the ordinary record is merely to show that evidence was adduced to the jury, as it shows that the jurors were in fact sworn. It being inconsistent with the duty of the clerk and with the functions of the ordinary record that the terms of the oath should appear on such record, and consistent with both that

such record should merely show that the jurors were in fact sworn, the legal presumption must always be, that no more was intended by the clerk in making this record, and the circuit judge in signing and approving it, as he is required to do before the adjournment of a term: McClellan's Digest, sec. 6, p. 174; and this principle will prevail, unless there is something in the entry which clearly negatives it. Keeping in mind this principle, the logical conclusion to be drawn as to the entry in question before us is, that it does not recite, and was not intended to recite, either of the oaths prescribed by the statute and set out above, but only purports to state, and was intended to state, that the jurors were in fact duly sworn to try the issue which had been joined in this case; or in other words, that the oath prescribed by the statute for capital cases had been administered to them in this cause; or in other words, that the oath prescribed by the statute for capital cases had been administered to them in this cause for the trial of the issue shown by the record to have been joined. No other conclusion is consistent with the statement that they were "duly sworn . . . to try the issue joined"; and such statement imports, *ex vi termini*, that they were sworn according to the formula prescribed by law for all similar cases. This conclusion is fully sustained by the following authorities: *State v. Pile*, 5 Ala. 72; *Crist v. State*, 21 Ala. 137; *McGuire v. State*, 37 Ala. 161; *McNeil v. State*, 47 Ala. 499; *Edwards v. State*, 49 Ala. 334; *De Bardelaben v. State*, 50 Ala. 179; *Moore v. State*, 52 Ala. 424; *Blair v. State*, 52 Ala. 343; *Bush v. State*, 52 Ala. 13; *Mitchell v. State*, 58 Ala. 417; *Dyson v. State*, 26 Miss. 362; *Anderson v. State*, 34 Ark. 257; *Russell v. State*, 10 Tex. 288; *State v. Schoenwald*, 31 Mo. 147; *State v. Ostrander*, 18 Iowa, 435; *Bartlett v. State*, 28 Ohio St. 669; *Smith v. State*, 4 Neb. 277; *Mann v. Clifton*, 3 Blackf. 304; *Smith v. State*, 25 Fla. 517. There is nothing in *Potsdamer v. State*, 17 Fla. 895, that precludes this view.

5. The court charged the jury that "voluntary intoxication or drunkenness is no excuse for crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. If a person is sober enough to form the intention to shoot another (and actually does shoot and kill him without justification or excuse therefor), then the law presumes that such person is sober enough to form a premeditated design to kill the person shot, and in such case he is

criminally liable for his acts. One who commits a criminal act under the influence of passion or revenge, which may temporarily dethrone his reason, cannot be shielded from the consequences of his act by showing that at the time the crime was committed he was under the influence of intoxicants taken voluntarily by him." The defendant excepted, in his motion for a new trial, to the giving of the first two sentences of this charge, but did not except then, or previously, to the third sentence. No exception can be made primarily in the appellate court to a portion of a charge. This is the established practice; still, as the cause has to go back for a new trial, we will consider the entire instruction, as set out above.

It is true that voluntary intoxication, as distinguished from a state of fixed or settled frenzy or insanity, either permanent or, as in case of delirium tremens, intermittent, does not excuse a homicide or any other act which, but for such intoxication, would be criminal, though the immediate effect of the intoxication be to render its subject unconscious, for the time, of what he is doing, or temporarily insane; or in other words, it does not relieve of its criminal character an act which, committed under the same circumstances, omitting the immediate obliviousness or insanity produced by such intoxication, would be a crime in the eyes of the law. This is the general rule applicable wherever the voluntary doing of the wrongful act itself constitutes the crime, or a particular or specific intent is not an essential or constituent element of the offense; and in all such cases, a person who is, at the time of the commission of the act, unconscious or insane, as the immediate consequence of voluntary intoxication, is liable in the same manner and to the same degree that he would be if sober. Whenever, however, a specific or particular intent is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the capacity or ability of the accused to form or entertain the particular intent, or upon the question whether the accused was in such a condition of mind to form a premeditated design. Where a party is too drunk to entertain or be capable of forming the essential particular intent, such intent can, of course, not exist, and no offense of which such intent is a necessary ingredient be perpetrated. "Drunkenness," says Mr. Bishop (Crim. Law, sec. 409), "does not incapacitate one to commit either murder or manslaughter at the common law, because, to constitute either, the specific intent to take life need

not exist, but, generally, malevolence is sufficient. But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life, this specific intent does not in fact exist, and the murder is not in this degree, where one, not meaning to commit a homicide, becomes so drunk as to be incapable of intending to do it, and then, in this condition, kills a man. In such case the court holds that the offense of murder is only in the second degree." Of course, if one, "meaning to commit a homicide," becomes intoxicated voluntarily, thus "to nerve himself up for the occasion," as it is often expressed, and as may be done, intoxication will not have any effect upon the act and intent thus carried out. Where a premeditated design to effect the death of the person killed, or of some human being, is essential to the offense of murder in the first degree, which it is in this state, drunkenness or intoxication, though voluntary, is relative evidence, to be considered by the jury as affecting the capacity of the accused, at the time of the killing, to form a premeditated design to effect the death of the person killed, or any human being. If a jury find from the evidence that the defendant was, at the time of the killing, so much intoxicated as to be incapable of forming a premeditated design, or of deliberating sufficiently to form such a design, to take the life of the deceased, or any human being (*Savage v. State*, 18 Fla. 909), and yet that, but for this incapacity, the defendant would be guilty of murder in the first degree, they cannot find him guilty of murder in the first degree, because such premeditation is essential to the offense of murder in the first degree, as any other element of it: 1 Bishop's Crim. Law, secs. 400, 401, 406, 408, 409; 1 Wharton's Crim. Law, 48, 55; *Shannahan v. Commonwealth*, 8 Bush, 464; 8 Am. Rep. 465; *Boswell v. Commonwealth*, 20 Gratt. 860; *Jones v. Commonwealth*, 75 Pa. St. 403; *Pirtle v. State*, 9 Humph. 663; *Lancaster v. State*, 2 Lea, 575; *Cartwright v. State*, 8 Lea, 377; *Hopt v. People*, 104 U. S. 631; *State v. Donovan*, 61 Iowa, 369; *Wood v. State*, 34 Ark. 341; 36 Am. Rep. 13; *State v. Bell*, 29 Iowa, 316; *United States v. Roudenbush*, 1 Bald. 514; *Scott v. State*, 12 Tex. App. 31; *Roberts v. People*, 19 Mich. 401; *People v. Cummins*, 47 Mich. 334; *State v. Welch*, 21 Minn. 22; *Kelly v. State*, 3 Smedes & M. 518; *Wenz v. State*, 1 Tex. App. 36; *Keenan v. Commonwealth*, 44 Pa. St. 55; 84 Am. Dec. 414; *State v. McCants*, 1 Speers, 384; *Tidwell v. State*, 70 Ala. 33; *State v. Johnson*, 41 Conn. 585; *Cross v. State*, 55 Wis. 261. It is not

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held that such intoxication, and immediate effect thereof, will render that a sufficient provocation to reduce a killing to manslaughter which would not be so in the mere absence of such intoxication or effect, but, on the contrary, as between murder in any degree below the first and manslaughter, such intoxication plays no part, the only purpose for which it is admissible being to show an absence of the premeditated design, or that the killing was not murder in the first degree, and the consequence is, that the only effect of proof of such intoxication as to render the accused incapable of such intent will be to reduce the killing to murder of the second or third degree, according to the circumstances.

We think the first sentence of the instruction was too broad, and was calculated to mislead. It at least did not submit to the jury the consideration of the effect of intoxication upon his capacity to form the premeditated design to kill. As the judge saw fit to charge upon the question of intoxication, it was material to the accused that he should have had the benefit of this view, since he was charged with murder in the first degree.

The second sentence is erroneous, in that it says that the law presumes that a person who is sober enough to form the intention to shoot another, and actually does kill him without justification or excuse, is sober enough to form a premeditated design to kill the person shot, and in such case he is criminally liable for his acts. It is true that a person who is sober enough to form the intention to shoot, and does shoot and kill another without excuse or justification, is criminally liable, according as the law defines the offense and fixes the liability, but the shooting a person intentionally and killing him is not necessarily the same as doing so with a premeditated design to kill him. There may be intention without its having been premeditated: *State v. Johnson*, 41 Conn. 585; *Keenan v. Commonwealth*, 44 Pa. St. 55; 84 Am. Dec. 414; *Kelly v. State*, 3 Smedes & M. 518; *Roberts v. People*, 19 Mich. 401; and the fact that the evidence may satisfy the jury that a person is sober enough to form the intention to shoot may not satisfy them that he was sober enough to form a premeditated design to kill. They may believe that the intoxication was such as to prevent the deliberation necessary to form a premeditated design, and yet not believe that it was sufficient to prevent an intentional shooting. It is true that the law presumes a sober man to intend what he does, but the law does not presume a

killing with a premeditated design; this, like every other element of murder in the first degree, is to be inferred by the jury from the facts proved: *Dukes v. State*, 14 Fla. 499.

The third sentence, viewed in the light of the law given above, is, in its application to murder in the first degree, erroneous. It excludes the idea that by reason of the overcoming influence of intoxication, the accused may be in a condition which renders him incapable of forming a premeditated design. Of course, if passion and revenge have temporarily dethroned a man's reason, and in this condition he has committed a crime, then the fact that he is intoxicated must necessarily not have played any part in the crime; for it is passion or revenge, and not intoxication, that have affected his reason.

6. The defendant requested the judge to charge the jury: If you believe from the evidence that the deceased has threatened to take the life of defendant, and that such threat had been communicated to defendant, and that at the time the defendant shot the deceased, the latter had his left hand on defendant and his right behind him, the deceased, then you may consider whether such facts would be sufficient to warrant the defendant to apprehend that his life was in danger, or that he was at the time in danger of great bodily harm. The court refused to give the instruction as proposed, but added thereto the following: You should be satisfied that at the time defendant shot, the deceased had his right hand behind him, and the defendant honestly believed that the deceased then intended to use a deadly weapon on him, and should consider all the facts and circumstances proven, to ascertain whether there was apparent imminent danger of great personal injury being accomplished by the deceased against the defendant, and that defendant then and there shot deceased under an honest belief that it was necessary to protect himself.

The charge requested was erroneous. It excluded from the jury all the other circumstances of the killing testified to. It is objected that the addition to the charge took "from the defendant the right to act upon the appearances of bodily harm from the deceased, and restricted the defendant to the fact of his belief that the deceased was in the act of using, and then intended to use, a deadly weapon on him, for justification or excuse." In view of what follows in this instruction, after the use of the term "deadly weapon," we are not satisfied that the objection to the charge is tenable. It seems to us to present directly to the jury the right of the prisoner to act on appear-

ances of great bodily harm, which had also been referred to in the general charge given by the court. However, upon the new trial, the judge may modify the expression "deadly weapon," defined by this court to mean any weapon likely to produce death (*Pittman v. State*, 25 Fla. 648), to any weapon likely to produce death or great bodily harm, or in any other manner that the circumstances, as then shown by the evidence, may require to preserve to the accused the benefit of the reasonable fear of death or such injury.

7. The only other assignment of error properly involving an exception to the charge, and based on a proper exception, is that as to recommendation to mercy. The judge instructed the jury as follows: "Should you so find [meaning, as shown by what preceded, if they found the accused guilty of murder in the first degree], and a majority of you—a majority of your body—feel it to be your duty under oaths, you may recommend the prisoner to the mercy of the court. It takes a majority of your body to make such a recommendation; it is in your discretion, and you may do so if you feel it to be your duty under your oaths." The court gave them the form of a verdict with recommendation, and stated the legal consequence attached to such recommendation. The language quoted above is objected to, it being urged that the statute and a juror's oath fix and settle his duty without any statement from the bench calculated to influence him in any way in discharging it.

In *Newton v. State*, 21 Fla. 53, 99–101, this court held, in effect, that counsel may read the act to the jury; and also that if a circuit judge deems it necessary to charge on the statute, his charge should be in the language of the act, and that the statute does not either make it his duty to charge or prohibit him from doing it. In *Newton's* case, the judge gave his views of the act, which, in short, were, that the recommendation should be founded on mitigating circumstances shown by the evidence, and was not to be made simply from tender feeling as to the capital punishment, or sympathy for the accused, and this court remarked that it was improper for the circuit judge, after stating that the recommendation is in the discretion of the juries, to attempt to control them in its free exercise according to their own judgment of the merits of the case.

We are not prepared to say that the language excepted to would have influenced the jury. We presume the idea of counsel is, that the jury might have found in the reference to

their oaths a caution against recommendation, and we do not say that such a caution could not potently, though unintentionally, be conveyed by the intonation of the voice in the use of it and the accompanying words, but there is, of course, no intimation of this kind, and such a thing is never to be presumed. However, the purpose of the act is, that a majority of the jury may, if they deem it proper, recommend to mercy, and that it shall have the effect stated, and the duty of the judge is best performed by simply stating the terms of the act to the jury, and telling them that the making or withholding the recommendation is a matter which the law has placed entirely within the discretion of a majority of them. We would not hesitate to reverse a case, where it appeared either from the charge, in so far as it bore on this point, or from such part considered with others, that the jury might have been influenced in the use of their discretion by something falling from the judge.

The judgment must be reversed, and cause will be remanded for a new trial.

TRIAL — MOTION FOR CONTINUANCE — DISCRETION OF COURT. — The continuance of a criminal case is within the discretion of the court: *McFadden v. Commonwealth*, 23 Pa. St. 12; 62 Am. Dec. 308, and note; *Roberts v. State*, 14 Ga. 8; 58 Am. Dec. 528; *State v. Carter*, 98 Mo. 176. The granting of a motion by the defendant in a criminal case, based on the alleged illness of his counsel, is addressed to the discretion of the trial court: *State v. Rainsbarger*, 74 Iowa, 196; *State v. Stegner*, 72 Iowa, 13.

HOMICIDE — EVIDENCE — THREATS OF ACCUSED. — Evidence of a former difficulty, and the threats made in connection therewith, are admissible on the part of the prosecution, though the particulars of the difficulty are not: *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853, and note. Evidence of threats made by a prisoner a few minutes before the commission of a crime, "that he would kill somebody before twenty-four hours," are admissible in evidence to show malice prepense: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518, and note. Menaces may be proved against a prisoner charged with the murder of the person menaced: *Dunn v. State*, 2 Ark. 229; 35 Am. Dec. 54; see notes to *People v. Campbell*, 43 Am. Rep. 262; *Fields v. State*, 11 Am. Rep. 776.

HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED. — Evidence of the reputation and general character of the deceased for violence is admissible as bearing upon the act and motive of the prisoner: *State v. Turner*, 29 S. C. 34; 13 Am. St. Rep. 706, and note; *State v. Turpin*, 77 N. C. 473; 24 Am. Rep. 455, and note. Such evidence is not, however, admissible, unless the conduct of the deceased at the time of the killing was such as to create in the mind of the accused a reasonable apprehension of great bodily harm: *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324, and note; *Harrison v. Commonwealth*, 79 Va. 374; 52 Am. Rep. 634, and note; *Wise v. State*, 2 Kan. 419; 85 Am. Dec. 595, and note. See also *Childers v. State*, 30 Tex. App. 160; 28

Am. St. Rep. 899, and note. Evidence of this character is admissible to enable the jury to determine the degree of the offense and the character and measure of the punishment, under a statute dividing murder into two degrees, and requiring the jury to find the degree and determine the punishment to be inflicted: *Fields v. State*, 47 Ala. 603; 11 Am. Rep. 771, and note.

SWEARING OF JURY IN CRIMINAL CASE. — The jury in a criminal case must be sworn to well and truly try, and true deliverance make between the state and the prisoner, and to give a true verdict according to the evidence. To simply swear them "to say the truth in the premises" is wholly insufficient: *Patterson v. State*, 7 Ark. 59; 44 Am. Dec. 530.

TRIAL — DUTY OF COURT — IMPROPER CHARGE. — A charge which presents facts, or suggests a conclusion from facts, without informing the jury that they are the sole judges of such facts, is erroneous: *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499, and note. All that is required of a judge is, that he should neither decide, nor endeavor to influence the jury in their decision, on the facts: *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550, and note. Where a witness is in conflict with himself, it is for the jury to decide such conflict: *State v. Adams*, 78 Iowa, 292. A charge to the jury to disregard altogether a witness's testimony, if they believe that it is willfully false in part, is improper, as it is an invasion of their province: *Lowe v. State*, 88 Ala. 8.

CRIMINAL LAW — INTOXICATION AS A DEFENSE. — Voluntary intoxication will not excuse the commission of a crime; yet where the crime can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing the act charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the offense: *Chrisman v. State*, 54 Ark. 283; 26 Am. St. Rep. 44, and note; *Keenan v. Commonwealth*, 44 Pa. St. 55; 84 Am. Dec. 414, and note; see extended note to *Flanigan v. People*, 40 Am. Rep. 560. Drunkenness is no excuse for committing crime: *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875, and note.

HOMICIDE — SELF-DEFENSE — REASONABLE FEAR. — All that is required of the slayer is, that at the time of the killing, the circumstances were such as made it, from his stand-point, reasonable for a prudent and cautious man to believe it was necessary for him to fire the fatal shot, in order to save himself from death or great bodily harm: *Pinder v. State*, 27 Fla. 370; 28 Am. St. Rep. 75, and note. In charging the jury as to self-defense, the correct rule is, that if it "reasonably" appeared to the accused from his stand-point and the circumstances that danger existed, and he acted under such belief, he was justified in defending himself to the same extent as though the danger had been real: *Tillery v. State*, 24 Tex. App. 882; 5 Am. St. Rep. 882, and note; *Stanley v. Commonwealth*, 86 Ky. 440; 9 Am. St. Rep. 305, and note. Mere fear or belief, however sincere, by one man that another designs to kill him, will not justify the former in slaying the latter, where the danger is neither real nor urgent: *Wesley v. State*, 37 Miss. 327; 75 Am. Dec. 62, and note. It is not enough that the party assailed should believe, but the circumstances must be such that a jury can say that he had reasonable grounds to believe, himself in danger: *State v. Thompson*, 9 Iowa, 188; 74 Am. Dec. 342, and note.

INDIAN RIVER STEAMBOAT COMPANY v. EAST COAST TRANSPORTATION COMPANY.

[28 FLORIDA, 387.]

INJUNCTION — DISSOLUTION OF, ON MOTION AFTER EXCEPTIONS TO ANSWER—

— The mere filing of exceptions to portions of an answer, not in response to a bill for an injunction, is, of itself, no objection to the dissolution of the injunction on motion, when the portion of the answer not excepted to sufficiently denies the grounds of equity upon which the injunction was granted.

INJUNCTION. — MOTION TO DISSOLVE INJUNCTION ON BILL AND ANSWER INVOLVES the sufficiency of the equities of the bill to justify the writ in the first instance.

INJUNCTION TO RESTRAIN TRESPASS. — While an injunction will not be granted to restrain a trespass, merely because it is such, yet equity will interfere by injunction where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits, or where the trespasser is insolvent, and on that account unable to atone for it.

INJUNCTION TO RESTRAIN TRESPASS—SUFFICIENCY OF BILL. — A bill, to justify an injunction in case of trespass, in addition to an allegation that complainant has no adequate remedy at law and that his damage will be irreparable, must also allege such facts as will enable the court to determine whether or not his alleged injury will be irreparable.

INJUNCTION — MOTION TO DISSOLVE — NEW MATTER IN ANSWER NOT CONSIDERED. — When the equity of a bill for injunction is admitted by answer, or not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not a denial of complainant's equity, and the injunction will not be dissolved on motion, but will be continued until a hearing of the cause. On such motion, the court will look only to such facts of the answer as are responsive to the bill, and the new equity set up in the answer to avoid that disclosed in the bill will not be considered.

INJUNCTION — DISSOLUTION OF — DISCRETION OF COURT. — While an injunction will ordinarily be dissolved on motion upon an answer denying all the equities of the bill, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, it does not follow as a matter of course to do so in all cases, because the dissolution or continuance of an injunction on motion to dissolve rests in the sound discretion of the court, to be governed by the nature of the case.

INJUNCTION TO AID MONOPOLY. — A corporation engaged in carrying freight and passengers on a navigable river by means of steamboats cannot create a monopoly by obtaining a lease from a railroad company of its dock on said river, on which its track and terminal facilities are located. Nor is it entitled to an injunction restraining and excluding all others from landing at such dock for the purpose of delivering or receiving freight to and from such railroad company.

INJUNCTION — DISSOLUTION OR CONTINUANCE OF, ON MOTION — DISCRETION OF COURT. — In determining the propriety of dissolving or continuing an injunction on motion, the court may not only anticipate the character of the injury that may result to the complainant in the event that he

should finally succeed, but it can also consider the extent and character of the damage which defendant may sustain by means of the continuance of the injunction, and the action of the court will not be disturbed unless a sound discretion has been abused.

INJUNCTION — DISSOLUTION OF, ON MOTION, AND DISMISSAL OF BILL. —

Where a bill in equity prays for other relief besides an injunction, it is error, when dissolving the temporary injunction on motion, to also dismiss the bill, when it states a case which would, if proved on the final hearing, entitle the complainant to the other relief prayed for.

APPEAL from a decree dissolving a temporary injunction, and dismissing the bill upon which it was granted. The facts of the case are stated in the opinion.

Hamblin and Stewart, for the appellant.

Robbins and Graham, for the respondents.

MABRY, J. The question sought to be presented by the motion to strike the answer of respondents from the files does not properly arise. The bill was filed against R. P. Paddison, George M. Robbins, and Walter S. Graham, doing business as the East Coast Transportation Company. The answer alleges that G. F. Paddison, George M. Robbins, and Walter S. Graham composed the East Coast Transportation Company, and that R. P. Paddison was only an employee of said company. It is further stated in the answer that said company was then incorporated under the laws of Florida, but respondents waive the misnomer as to R. P. Paddison and the failure to denominate them as a corporation in the bill. While they say they appear in their corporate capacity as the East Coast Transportation Company, in fact it is the answer of respondents individually, as they are sued.

Without a hearing on the motion to strike, complainant filed numerous exceptions to the answer, and said motion may be considered as abandoned.

The exceptions to the answer were filed after the motion to dissolve was made, and pending the consideration of said motion. It seems that an order *nisi* to dissolve an injunction, under the English chancery practice, obtained after exceptions to the answer have been filed, is irregular: *Williams v. Davis*, 1 Sim. & St. 262; *Howes v. Howes*, 1 Beav. 197. In *Gibson v. Tilton*, 1 Bland, 352, 17 Am. Dec. 306, it is said by the chancellor: "On the hearing of a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order, because the motion itself, in its very nature, is founded upon the correctness and sufficiency of the answer

in every particular. Hence the plaintiff may, on the very day of hearing the motion, file exceptions to the answer, and have them then heard and decided upon. The defendant can have no cause to complain of surprise, because by his motion he calls upon the plaintiff to show cause why, after having well and sufficiently answered the bill, the injunction should not be dissolved. And having thus planted himself upon the sufficiency of his answer at that time, and for that purpose, he stands pledged to sustain it in all respects, or he must fail in his motion." In *Stitt v. Hilton*, 31 N. J. Eq. 285, it was held that where the answer sufficiently denied the grounds of equity upon which the injunction was granted, it will be dissolved, although exceptions to other parts of the answer have been filed. The court said: "The filing of exceptions to an answer is, of itself, no objection to the dissolution of an injunction. The court will consider the exceptions only for the purpose of ascertaining whether they relate to those parts of the bill on which the injunction was awarded." The exceptions to the answer in the case now under consideration are pointed specially at the portions setting up the decision of the railroad commission and the location of the dock in question in a public street of the town of Titusville. The conclusion we have reached in reference to the effect of such portions of the answer on the issue before us, as will fully appear in a subsequent portion of this opinion, makes it unnecessary for us to consider the question of exceptions at all, as they relate to matters which have no bearing on questions settled here. We proceed to inquire, then, into the other matters presented for our consideration upon the appeal. In so far as the correctness of granting or dissolving the injunction is involved, it is clear that we have to deal only with the matters presented by the record in relation to the Titusville dock, as no injunction was granted as to any other.

The appellees, in contending here for an affirmance of the decree of the lower court in dissolving the injunction, do not question, it seems, the sufficiency of the bill in point of equities to justify the issuance of the injunction on an *ex parte* showing. Upon information of the existence of the bill and the issuance of the writ, they filed an answer, and upon that moved to dissolve. This they had a right to do, but their motion to dissolve involves the sufficient equities of the bill to justify the writ in the first instance. We will therefore inquire if the bill justified the issuance of the injunction. The last case decided by

Chancellor Kent (*Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484) has been recognized as occupying a foremost place on the subject of equitable jurisdiction in matters of trespass. In this case, the remedy of injunction was invoked to restrain a defendant from digging and carrying away rock from plaintiff's premises, and was denied on appeal by the learned chancellor. Nothing special was alleged as to the value of the rock, or the uses to which it could be applied. The principle announced here is, that an injunction will not lie to enjoin a mere trespass, where the injury is not irremediable, and destructive of the estate, and when the ordinary legal remedy in a court of law will afford adequate satisfaction. In *Shipley v. Ritter* 7 Md. 408, 61 Am. Dec. 371, it is said, that although an injunction will not be granted to restrain a trespasser merely because he is a trespasser, yet equity will interfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits. Here an injunction was decided to be proper to restrain the destruction of timber so situated with reference to a dwelling-house that it sheltered it from storms and shaded it from the sun, and was ornamental to the grounds. A very clear view of the chancery court's powers in such cases is expressed in the case of *Gause v. Perkins*, 3 Jones Eq. 177; 69 Am. Dec. 728. It is here said: "Much difficulty occurs in defining what injury is irreparable. The word means that which cannot be repaired, retrieved, put back again, atoned for." An example is given in this case of the destruction of the noble oaks in the state-house grove. "But the meaning of the word 'irreparable,' pointed at by this example, is not that which has been adopted by the courts either in England or in this state. Grass that is cut down cannot be made to grow again, but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." There is nothing in the nature of a dock itself to make the landing of boats thereat a cause for equitable interposition. An injunction for this purpose was granted in the case of *New York Printing and Dyeing Est. v. Fitch*, 1 Paige, 97. On

appeal, Chancellor Walworth dissolved it. He says, in dissolving this injunction, that "it is sufficient for the decision of the question immediately before the court, that it does not appear that any serious damage or irreparable injury will take place if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainants' rights are admitted by the answer, or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights." The view is expressed in this case, that while an injunction may issue to restrain a trespass, there must be something peculiar in the case to sustain the jurisdiction and bring it under the head of quieting possession, or to make a case of irreparable mischief, or the value of the inheritance must be put in jeopardy by a continuance of the trespass. It has been declared by our own court that "the object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which if done would be contrary to equity and good conscience; and it is the appropriate relief when the remedy at law is subsequent to the injury, and the effects cannot be adequately compensated": *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26; 91 Am. Dec. 747. While it is said in this case that insolvency alone of the person against whom the injunction is asked is not sufficient to give the court jurisdiction to grant the writ, yet this fact may be taken in connection with other equitable grounds to aid the jurisdiction: *Yonge v. McCormick*, 6 Fla. 368; 63 Am. Dec. 214. In *Burns v. Sanderson*, 13 Fla. 381, it was held that averments in a bill that defendant had interfered and intermeddled with the real estate described in the bill, and continues to do so, and has and still continues to forbid the tenants and lessees to pay the rent to the plaintiff, and has forcibly entered one of the buildings on the premises, do not lay a foundation for an injunction. It is said: "The bill does not allege that irreparable damage or mischief will ensue, nor does it state the facts complained of, so that the court may form its own conclusion in reference thereto." For all the alleged trespasses and grievances in this case there was an adequate remedy at law, and nothing was alleged to show that irreparable injury would result, and the remedy at law inadequate to fully compensate for it.

It is to be observed, in considering the sufficiency of a bill to justify an injunction in cases of trespass, it will not do to simply allege that complainant has no adequate remedy at law, and that his damage will be irreparable. The courts will not act upon complainant's opinion, or even his fears, in such matters, but he must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Tested by the rules applicable to such cases, we think the equities of the bill in the case before us in reference to the Titusville dock are sufficient to justify the issuance, on proper application, of the writ of injunction. The bill alleges that the complainant company is engaged in operating boats on the Indian River, in the business of carrying freight and passengers, and is under a contract to carry the mails; that it has leased from the Jacksonville, Tampa, and Key West Railway Company the portion of the dock and pier at Titusville particularly described in the bill, and has the exclusive right to use the same for the landing of its boats; not only has it this right, but that it has been, since March, A. D. 1889, in the exclusive use of said dock and pier, and its offices and headquarters are there; that said dock and pier are inadequate to accommodate fully complainant's business, and that it has never held itself out as a wharfinger. The bill also alleges that the character of its traffic business—carrying perishable products, and its mail contract—requires complainant to act with great promptness in making connections, and a failure to do so would subject it to forfeiture and heavy penalties; that its winter business is much heavier than in the summer, and that the winter business had set in, was rapidly increasing, and that all the room on said dock was imperatively demanded to enable complainant to carry on its business, and meet its obligations under its mail contract; that the use of said dock by respondents for any considerable time would cause delays in loading and unloading, and possible loss of connections, and thereby cause irreparable damage; and further, that complainant was under contract to transfer and deliver immediately large shipments of freight and materials which peculiarly tax all its facilities to the utmost, and that any interference with said dock would at the time be especially injurious. It is then alleged that respondents have procured one or more boats, propose and are engaged in carrying freight and passengers on said river, and that they persist in landing

their steamboats at complainant's said dock through force of threats made by them that if they are deterred from landing, or hindered in any way in transacting their business at said dock, they would cause to be arrested the agents and employees of complainant, and that for each package of freight or other matter refused to be received upon said dock they would sue complainant for damages, and that respondents threaten to continue daily to land at said dock, and to use the same freely for all purposes connected with their business, without the payment of wharfage or other charges; that not, withstanding the lease of said dock to complainant, and its exclusive occupation of the same, of all of which respondents have been fully informed, they claim that said dock is public property, and they have the right, in common with all persons, to all the rights and privileges of complainant in and about the same, and that if respondents are permitted to succeed in freely using and occupying said leased premises, the entire public will also insist in doing so, and the same will become worthless as a franchise and place of business for complainant.

It is further alleged that complainant apprehends that respondents cannot be deterred from using said property, except by the daily use of superior force, and that if such force be used, or packages of freight consigned to them be refused, complainant would be subjected to a multitude of vexatious suits, and the use of said dock by respondents would necessitate the removal of complainant's boats at times herefrom, and would prevent it from properly conducting its business, storing its freight, mooring its boats, and would thereby cause it irreparable injury. Not only would said interference with said dock by respondents cause litigation, expense, delays, such as seriously to affect its business, prejudice its rights, and cause irreparable damage, but that respondents are believed to be insolvent, and the judgments that might be recovered against them would be uncollectible. These averments are sufficient to justify the writ: See authorities above cited, and also *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368, and note; *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79; *Rogers Locomotive etc. Works v. Erie R'y Co.*, 20 N. J. Eq. 379.

The motion to dissolve being based upon the answer of respondents, the justification of the decree of the court in dissolving the injunction must be found in the allegations of said answer, as respondents filed no additional evidence. In the beginning of an examination of the answer, we must keep in

mind that on motion to dissolve, respondents will not be permitted to rely upon new matter in avoidance in their answer, not in response to the allegations upon which the equities of the bill are founded. It is stated in High on Injunctions (vol. 2, sec. 1481, 3d ed.) that "no principle of the law of injunction is better established than that where the equity of the bill is admitted by the answer or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of complainant's equities, and the injunction will not be dissolved, but will be continued until a hearing of the cause." The numerous authorities cited in the notes sustain this proposition. In *Yonge v. McCormick*, 6 Fla. 368, 63 Am. Dec. 214, it was decided that the court, on motion to dissolve an injunction, will look to such facts of the answer only as are responsive to the bill, and where a new equity is set up in the answer to avoid that disclosed in the bill, it will not be considered. *Vide also McKinne v. Dickenson*, 24 Fla. 366. In their answer, respondents admit that they have purchased a steamboat for the carriage of freight and passengers, and are landing the same at the said Titusville dock, and that they cannot be deterred from doing so except by the daily use of superior force. They say that they are landing at said dock for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa, and Key West Railway Company, under authority of a decree of the railroad commission of the state of Florida securing respondents in that right. Respondents then allege in their answer, that in July, 1890, they complained to the railroad commission of the state of Florida, that the Jacksonville, Tampa, and Key West Railway Company, a railroad corporation operating a railroad in Florida discriminated against respondents by attempting to lease the exclusive use of said dock and pier at Titusville, which was the river terminal of said railroad company, and that upon their complaint, and after due hearing, said commissioners decided, on the fourteenth day of August, A. D. 1890, that the charter terminus of said railroad company was the channel of Indian River, to which point said road had been constructed, and that said dock and pier at Titusville are a part and parcel of the main line of said railroad, and a necessary and indispensable facility which the law enjoins it to provide for the transportation of its business; further, that said railway company, by said lease to said steamboat company, had attempted

to vest in it an exclusive use of said dock, and it was thereupon adjudged that said railroad company was guilty of an unjust discrimination, under section 4, chapter 3862, Laws of Florida, and that it at once desist, and extend to the East Coast Transportation Company the same uses, services, facilities, and privileges at the end of said dock as are extended to the complainant company. The decision of the railroad commission, a certified copy of which is filed as a part of the answer, is set up therein as a complete bar to the relief prayed in the bill. This decision was based upon proceedings instituted by the East Coast Transportation Company against the Jacksonville, Tampa, and Key West Railway Company, and the complainant steamboat company was not a party to it. While it is determined in said decision that during the years 1886, 1887, and 1888, the Jacksonville, Tampa, and Key West Railway Company transacted all its business at the end of the said dock, and all its river freight was delivered at its freight-shed at the end of said dock, and that the said dock was a part and parcel of the main line of the railroad company, to which the Jacksonville, Tampa, and Key West Railway Company succeeded by lease, and a necessary and indispensable facility for the transaction of its business, which the law enjoins it to provide, at the same time it was decided by the said commission that it had no jurisdiction of the Indian River Steamboat Company, and no order was made, so far as this company was concerned.

It also appears by the said decision that the commission was proceeding under the last clause of section 4, chapter 3862, Laws of Florida, which provides that no common carrier subject to the provisions of this act shall "make any unjust discrimination in the receiving of freight from or in the delivery of freight to any competing lines of steamboats in this state," and that they had not prescribed any rules and regulations defining or specifying what would be considered as acts of unjust discrimination under this clause, but deemed it advisable to let each case of alleged unjust discrimination rest upon its attending circumstances.

In the decision set up in the answer, the commission, on the complaint made, heard the facts, and decided against the Jacksonville, Tampa, and Key West Railway Company, as above stated. Appellees say that the decision has the force and effect of law so far as their right to land at the said dock goes, and that the failure of the complainant company to allege and show this decision before the injunction was obtained was

an imposition upon the court, and a just ground for dissolving the temporary injunction. On the other hand, the appellant company says that its lease was obtained from the said railroad company before the said decision was rendered; that it was not a party to the proceedings upon which said decision was based, and that the said railroad commission had no jurisdiction to adjudicate its rights in any manner whatever.

It will be observed that in this portion of the answer the decision of the commission is set up as a complete bar to the relief sought. The facts which the commission found and adjudicated to exist are not averred, but simply the decision of the commission is alleged as a sufficient defense to the equities of the bill. Under the rule above announced, we do not think the consideration of this portion of the answer comes properly before us. We are considering the correctness of the decision of the court in dissolving the temporary injunction, and the portion of the answer now under consideration is not in response to any allegation in the bill, and sets up new matter in defense of the case made in the bill. It is not such a negation of the equities of the bill as to be a responsive denial of the circumstances upon which they are based, and hence we are not called upon to pass upon this portion of the answer. Counsel for appellees do not contend that the portion of the answer alleging the dock to be part of a public street called Broad Street, in the town of Titusville, is in response to the equities of the bill, and entitled to consideration on the motion to dissolve. In view of the conclusion which we have reached on the other allegations of the bill, it becomes unnecessary for us to consider this portion of the answer. What are the other allegations, then, of the answer responsive to the equities of the bill? It is evident that complainants' equity for the injunction depends upon the validity of its title or right to the dock in question. Confining ourselves to the allegations in reference to the Titusville dock,— the one in question,— we see that the complainant company claims an exclusive right to use, occupy, and land its boats at said dock. Its right to the exclusive use of this dock is derived, it is claimed, by lease from the Jacksonville, Tampa, and Key West Railway Company. A copy of the lease is filed with the bill. The lease covers about 390 feet of the east end of the dock, and by the terms of the lease the railway company "covenants and agrees to maintain the railroad track on said pier and bulkhead, and trestle supporting said track, and to furnish

proper and adequate facilities for transfer of local freights to and from said bulkhead." It is further alleged that said leased dock and buildings thereon have been constantly occupied and used by the complainant company for its offices, headquarters, and place of transacting most of its general business since the first day of March, A. D. 1889. Respondents deny that they are seeking to make their headquarters at said dock, but say they are landing there for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa, and Key West Railway Company. There is nothing in the affidavits to show that respondents are making any attempt to occupy any houses or to establish headquarters on said dock. It appears in one of the affidavits that at least two of the complainant company's boats were moved on one occasion to make room for respondent's boat to land at said dock. The landing at the dock by respondent's boat is admitted, but it is alleged to be for the purpose of receiving and delivering freight to and from the railroad company. Respondents admit the alleged lease from the Jacksonville, Tampa, and Key West Railway Company, but they deny that said lease is now in full force and effect, or ever was valid or effectual in law. They aver that said dock so leased constitutes the charter terminal of said railroad company, and they deny that the sole object of said complainant company in entering into said lease with said railroad company was to control premises adequate to the transaction of its business, but they aver that its object therein was also to control the said terminal facilities of the said railroad company on the Indian River at Titusville, and thus to prevent the use of said railroad terminal facilities by any competing line of steamboats that might be put on said river, in order to preserve a monopoly of the transportation business on said river, and that the use of said railroad terminal facilities has been denied to respondents and the public since said lease.

Respondents also allege that said lease by the Jacksonville, Tampa, and Key West Railway Company to said complainant company is not merely voidable, but the same is utterly void and worthless upon its face, as repugnant to the common and statute laws of Florida, and a violation of the charter duties of said railroad company, in attempting to exclude the general public from the use of a portion of its road which is a public highway of the state, and a further violation of law, in that it attempts to give to said complainant company the exclusive

use of said railroad terminal, to the exclusion of all other competing lines of steamboats, including that of respondent; and they deny the allegation that they are not pecuniarily responsible for any and all damages that they may occasion said complainant company.

The mere conclusions of law stated by respondents in their answer in reference to complainant's ownership or right to said dock can have no weight in determining the questions before us. But independent of such statements, and of the allegations in reference to the railroad commission decision, and the location of the dock in the public street, the answer denies complainant's title or right to the exclusive use of the dock, and such denial is based upon the fact that said dock constitutes a portion of the track and terminal facility of the Jacksonville, Tampa, and Key West Railway Company, and the exercise of the right claimed by the complainant company would have the effect to exclude other competing lines of steamboats from landing at said railroad terminal facility. The bill discloses the fact that complainant's right to the dock was derived from the Jacksonville, Tampa, and Key West Railway Company, which is a common carrier of freight and passengers, and the lease shows that said railroad company covenanted with the complainant company to keep the railroad track on said dock in repair, and to furnish adequate facilities for landing local freights from said dock. The answer, in effect, says that complainant has no right, notwithstanding its lease, to exclude other competing lines of steamboats from landing at said dock, because it is a part of a railroad track, and the terminal facility of a common carrier. William B. Watson, general superintendent of the complainant company, in his affidavit, states that he is personally familiar with the objects that prompted the lease of said dock from the Jacksonville, Tampa, and Key West Railway Company; that the main object is truthfully stated in the bill of complaint; and it was not the object of said steamboat company in leasing said dock to control the terminal facilities of said railroad company, or to prevent the use of said dock by any competing line that might be put on the river, in order to preserve a monopoly; that at the time of said lease there was no opposition line upon said river, nor was there any rumor or prospect that any such competing line would exist; that said dock was not then adequate to the needs of said complainant company, and said railway company did not deem it a good

investment for it to expend money in enlarging said dock and keeping the same in good repair for the revenue that could be derived from it; that the terms of said lease were agreed upon between the railway company and complainant company as a fair and reasonable disposition of said property, and that the complainant company has expended more than three thousand dollars in adding to said dock since it went into possession of the same. It is also stated in the affidavit that all the dock-room was needed for the complainant company in carrying on its business, and that it had never done a wharfinger business. The other portion of the affidavit has no reference to the lease. The other affidavit has no bearing on the subject of the lease.

The general rule on the subject of dissolutions of injunctions on bill and answer, prior to chapter 1098, Laws of Florida, was, that when the answer fully denied all the circumstances upon which the equity of the bill was based, the injunction would be dissolved, but this was not an inflexible rule, and the granting and dissolving of injunctions was lodged in the sound discretion of the court, to be governed by the nature and circumstances of each case: *Allen v. Hawley*, 6 Fla. 143; 63 Am. Dec. 198; *Carter v. Bennett*, 6 Fla. 214; *Yonge v. McCormick*, 6 Fla. 368; 63 Am. Dec. 214; *Hayden v. Thrasher*, 20 Fla. 715. Under chapter 1098, Laws of Florida, when "the defendant, in his answer, shall have denied the statements of the bill, or of the accompanying affidavit, either party thereto shall have the right to introduce evidence in support or denial of the bill and accompanying affidavit or answer, before the injunction or other summary order shall be dissolved, and the chancellor shall dissolve or continue the order, or may require security, according to the weight of the evidence." The old rule is modified by this statute to the extent of allowing either party to introduce evidence in corroboration or denial of the bill or answer, and affidavits before the hearing on the motion to dissolve, and that the chancellor shall then determine the matter, according to the weight of the evidence: *Sullivan v. Moreno*, 19 Fla. 200; *Fuller v. Cason*, 26 Fla. 476. While the chancellor will ordinarily dissolve an injunction upon an answer denying all the equities of the bill, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, it does not follow as a matter of course to do so in all cases. Where fraud is charged, an illustration is found in the case of *Hayden v. Thrasher*, 20 Fla. 715, that mere denials of fraud or of fraudu-

lent intent, without a full explanation of the facts charged in the bill, will not be sufficient to justify a dissolution of the injunction rightly granted in the first instance. And so in case an injunction is granted to prevent irreparable injury, the dissolution or continuance thereof rests in the sound discretion of the court, to be governed by the nature of the case: *Fuller v. Cason*, 26 Fla. 476.

Are the averments of the answer, given above, sufficient to constitute a responsive denial of the equities of the bill upon which rests complainant's right to relief? In the case of *Sullivan v. Moreno*, 19 Fla. 200, the complainant alleged that he and his grantor had for more than thirty years owned and possessed certain described parcels of land lying on the bay of Pensacola, and during all of said time had been in the quiet possession and enjoyment of all the rights of a riparian owner, until the defendant wrongfully entered into possession of certain portions of the front of said property out in the waters of said bay, and commenced the erection of certain docks, which, if permitted, would exclude plaintiff from his rights, and do him irreparable injury. It is also averred that said docks will prevent navigation and perpetuate a nuisance. Defendant, in his answer, admitted that complainant had been in possession and claimed to own the land mentioned in the bill, in respect to which riparian rights were asserted, but he denied that said lots ever did extend to the ordinary high-tide mark of Pensacola Bay, and affirmed that said lots were always bounded on the part towards the bay by a public way, street, or common, and exhibited a certified copy of a deed showing that the lots claimed by complainant were bound by said public street, way, or common. It was held that on this bill and answer, in the absence of other evidence, no injunction should have been granted, as the equities of the bill were completely negatived by the answer. So it was said in the cases of *Allen v. Hawley*, 6 Fla. 143, 63 Am. Dec. 198, and *Carter v. Bennett*, 6 Fla. 214, that a denial in the answer of the circumstances upon which the equities of the bill are founded will be sufficient, ordinarily, to dissolve the injunction. In this connection, it may be proper to state that in the affidavits of the general superintendent and agent of the complainant company, interposed after the answer was filed, it is not denied that the said dock is a part of the track and constitutes the terminal facility of the common carrier, the Jacksonville, Tampa, and Key West Railway Company. It is true that one affidavit states that the motive in

obtaining the lease was, not to secure a monopoly, and exclude competing lines of steamboats from landing at the terminal facility of said railroad company, but the facts set up in the answer in reference to the character of the dock are not denied in the affidavit, and the failure to do so is a circumstance weighing against the complainant company on this point. If what respondents have averred in connection with their denial of complainant's title or exclusive right to the dock be sufficient to destroy the equities of complainant's bill, we think it is so responsive as may be considered on the motion to dissolve.

The remaining question, then, is, Has sufficient been shown to defeat complainant's equity to have the injunction continued? It is not to be denied that said railroad company, or said complainant steamboat company, has the right to erect and maintain docks, wharves, and piers as incidental to their business, and hold them or dispose of them, as deemed proper. The bill alleges, and it is admitted, that the complainant steamboat company is a corporation, and that the nature and extent of its business render the erection and maintenance of docks and piers at Titusville and elsewhere on the Indian River necessary, and the right to do so is one of its charter privileges, and under the laws of this state, the Jacksonville, Tampa, and Key West Railway Company is authorized to build and maintain docks and wharves as incidental to its business. If either company should erect a dock or wharf for its private use, we know of no law to prohibit it. At least, as the matter is now presented, without any allegation or proof that the exercise of such a right would transcend the powers of such corporations, or that it is the only facility of the kind in the particular place, we cannot hold that they have no such rights. Undoubtedly, if either company should erect a dock or wharf, and open it to the public for a general wharfage business, the public would have a right to use the same, under such reasonable regulations and upon the payment of such charges as the owner might fix, or as might be regulated by law: *Ouachita etc. Packet Co. v. Aiken*, 16 Fed. Rep. 890; *Cannon v. New Orleans*, 20 Wall. 577; *Packet Co. v. Keokuk*, 95 U. S. 80; *Transportation Co. v. Parkersburg*, 107 U. S. 691.

But we are not dealing with the sole question of ownership or rights in reference to a dock or wharf. It is true that the bill characterizes the property in question as a dock or pier, and it appears that there are houses thereon occupied by the complainant company as its offices and headquarters, and

that said dock has been enlarged by said company by expending over three thousand dollars on it since its said lease. No doubt there are portions of this said dock to which said company is entitled to the exclusive use. But it also appears that upon this dock is the tracked terminus of a common carrier. The landing at said dock by respondents' boat for other purposes than delivering and receiving freight to and from said carrier is denied, and complainant company in the affidavits filed do not deny that the railroad track and terminal facility of the Jacksonville, Tampa, and Key West Railway Company are located on said dock. In fact, the contract of lease shows that said railroad company covenanted with the complainant company to keep in repair and maintain said track, and afford facilities for delivering freight to the latter company. We do not overlook the fact that it is alleged in the bill that there is another dock at Titusville, not owned by complainant company, at which respondents can, and sometimes do, land their boat, and that said leased dock does not interfere with the use of said other dock or those that may be constructed on the adjacent property along the extensive water-front at Titusville. It is not alleged, nor is it contended here, that the other dock mentioned or those that may be constructed along the water-front would offer respondents ingress and egress to the said railroad track and terminal facility. If it was designed by this allegation to show that respondents have another way of reaching said railroad on said dock for the purpose of delivering and receiving freight to and from said railroad, it is too indefinite to accomplish this object. No such effect is claimed for it here. The real question presented here is, Can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever

had such power as this. In the case of *New England Exp. Co. v. Maine Central R. R. Co.*, 57 Me. 188, 2 Am. Rep. 31, the railroad company contracted with the Eastern Express Company to give them a certain specified space in the car attached to the passenger train, and to transport their agents and property, on certain conditions, and agreeing specially that said railroad company would not grant or let any similar space in any car or cars attached to the passenger trains on its road to any other express company or persons during the continuance of said contract. This contract was declared to be void at common law, as being one obviously conferring a monopoly upon the express company. The chief justice who delivered the opinion of the court said: "Common carriers are bound to carry indifferently within the usual range of their business, for a reasonable compensation, all freight offered and all passengers who may apply. . . . All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for such refusal." In this case, it was said, in effect, that the common carrier could not escape its common-law liability, or avoid the performance of its duties to the public, by fencing off a part of a car for the Eastern Express Company. Quoting further the language of this opinion, it is said: "The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered right from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select, from those who may apply, some whom they will, and reject others whom they can, but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations." In this case, the contract with the express company was entered into before a statute was passed in the state of Maine giving all expressmen reasonable and equal terms, facilities, and accommodations, and the use of depots, buildings, and grounds, for the transaction of their business upon railroads in the state,

but the court held that the railroad company had no right before the passage of the act to make such a contract. A contract similar in its nature was held void in *International Exp. Co. v. Grand Trunk R'y Co.*, 81 Me. 92. The same doctrine was announced in the case of *Sandford v. Catawissa etc. R. R. Co.*, 24 Pa. St. 378; 64 Am. Dec. 667.

Judge Lewis says in this case: "If it [the common carrier] possessed this power, it might build up one set of men and destroy others; advance one kind of business, and break down another; and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill, they have a right to be served, all other things equal, in the order of their application. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law, and void." In *Bennett v. Dutton*, 10 N. H. 481, the facts were, that the defendant, proprietor of stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach, running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francistown. A third person ran a coach to and from Nashua to Lowell. The defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to places above Nashua. It was here held that defendant was bound to receive the plaintiff, there being sufficient room, and no evidence that he was an unfit person, or that he had any design to injure defendant. In *Marriott v. London etc. R'y Co.*, 1 Com. B., N. S., 499, it was held that an arrangement made by a railway company with the proprietor of an omnibus running between a station on its railroad and another point, to provide omnibus accommodations for all passengers by any trains on said road, by which the proprietor of said omnibus was allowed the exclusive privilege of driving his vehicle into the station-yard of said railroad for the purpose of taking up and setting down passengers at the door of said railroad office, was a breach of the prohibition against granting unfair preferences. This decision was made under the statute of 17 and 18 Victoria, prohibiting "un-

due and unreasonable" preference. Such a statute, however, has been regarded in America as declaratory of the common law, and the same result would be reached independent of the statute: *Sandford v. Catawissa etc. R. R. Co.*, 24 Pa. St. 378; 64 Am. Dec. 667; 1 Wood on Railroads, sec. 195, p. 563. See also the following authorities bearing on this branch of the case: *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6; *Rogers Locomotive etc. Works v. Erie R'y Co.*, 20 N. J. Eq. 379; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407; 13 Am. Rep. 457; *Messenger v. Pennsylvania R. R. Co.*, 37 N. J. L. 531; 18 Am. Rep. 754; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72.

The respondents denied that they were insolvent, and there is nothing in the affidavits on this subject. In determining the propriety of dissolving or continuing an injunction, the chancellor may not only anticipate the character of the injury that may result to the complainant in the event he should finally succeed, but he can also consider the extent and character of the damage which defendant may sustain by means of the injunction: *New York Printing and Dyeing Est. v. Fitch*, 1 Paige, 97. The proceedings here do not call for a cancellation of the lease from the railroad company to the complainant steamboat company, yet from what has been said, it is evident that the latter company cannot avail itself of said lease to prevent the respondents from reaching the railroad track and terminal facility of the former company: *State v. Hartford etc. R. R. Co.*, 29 Conn. 538. The temporary injunction was dissolved by the chancellor on bill, answer, and affidavits. His action should not be disturbed, unless we can see that a sound discretion has been abused.

The chancellor not only dissolved the injunction, but dismissed the bill. In dismissing the bill, we think there was error. The bill alleged that respondents were using and occupying said dock and pier at Titusville, and the premises and appurtenances thereto appertaining, and were seeking to make their headquarters thereon, and also the using and occupying numerous other docks at other points on said river. The injunction prayed was to restrain respondents from such use of said docks, and from making them the usual place for landing their boat, and that complainant be decreed the undisturbed and undivided possession of said docks. No injunction was granted as to any of the docks, except the one at Titusville, but respondents answered, tendering an issue upon the aver-

ments as to the other docks. They deny that they are making their headquarters on the Titusville dock, or using the same otherwise than as a landing at the railroad terminus for the purpose of receiving and delivering freight from and to the said railroad. It was proper, we think, to dissolve the injunction restraining respondents from landing their boat at the Titusville dock, under the circumstances; still, the bill states a case which would, if proven, entitle the complainant to the relief asked upon the final hearing, and it was not proper to dismiss its bill without an opportunity to sustain it in the usual way of making proof in such cases. It cannot be said that no other relief was sought in the bill, except to restrain respondents from landing their boat at the Titusville dock. Under the allegations here, and the circumstances of this case, the bill should not have been dismissed: 2 High on Injunctions, sec. 1477; *Gray v. Baldwin*, 8 Blackf. 164.

The decree of the chancellor, in so far as it dissolved the injunction, is affirmed, and in so far as it dismissed the bill, is reversed, the costs of the appeal to be divided between the parties.

INJUNCTION TO RESTRAIN TRESPASS — WHEN GRANTED. — Where a trespass or series of trespasses might operate to destroy or seriously impair a franchise, equity will prevent the injury by an injunction: *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note. Equity will grant an injunction where there is danger of irreparable injury, or when the value of an inheritance is put in danger: *Bracken v. Preston*, 1 Pinn. 584; 44 Am. Dec. 412, and note. An injunction should only issue to prevent great and irreparable mischief: *Hine v. Stephens*, 33 Conn. 497; 89 Am. Dec. 217, and note; *Poindexter v. Henderson*, Walk. (Miss.) 176; 12 Am. Dec. 550, and note. Injunctions may be granted to prevent trespasses, where the mischief would be irreparable, and to avoid a multiplicity of suits: *Livingston v. Livingston*, 6 Johns. Ch. 497; 10 Am. Dec. 353; *Tantlinger v. Sullivan*, 80 Iowa, 218; see extended notes to *Smith v. Gardner*, 53 Am. Rep. 346, and *Jerome v. Ross*, 11 Am. Dec. 497.

INJUNCTION — DISSOLUTION — MOTIONS FOR. — An injunction will not be dissolved where the equity of the bill is not denied in the answer, when a motion to dissolve it is made upon the bill, answer, and testimony: *Hamilton v. Whitridge*, 11 Md. 128; 69 Am. Dec. 184, and note. The allegations of the answer on motion to dissolve an injunction can be regarded only so far as they are responsive to the bill: *Hardy v. Summers*, 10 Gill & J. 316; 32 Am. Dec. 167. An injunction should not be dissolved on the denials of the answer, especially when irreparable injury might result, unless such denials were full and positive: *Kinney v. Ensminger*, 87 Ala. 340. Where the allegations of the complaint are made on information and belief, and are positively denied under oath in the answer, the injunction should be dissolved: *Yuba County v. Clabe*, 79 Cal. 239. On motion to dissolve an injunction, all objections to the

sufficiency of the answer will be considered: *Gibson v. Tilton*, 1 Bland, 352; 17 Am. Dec. 306, and note.

INJUNCTION — DISSOLUTION — SETTING UP NEW MATTER. — An injunction will not be dissolved on the filing of defendant's answer admitting plaintiff's equity, but setting up new matter in avoidance: *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79, and note. An injunction will not be set aside upon a showing by the defendant that since its issuance, the matter complained of has been abated, unless notice of the application was given to the plaintiff: *Hefflon v. Bowers*, 72 Cal. 270.

INJUNCTION — DISSOLUTION — DISCRETION OF COURT. — An order granting or dissolving an injunction is a matter of discretion with the trial court, and will not be reviewed, except where abuse of that discretion appears: *Porter v. Jennings*, 89 Cal. 440; *Harrison v. Yerby*, 87 Ala. 185; see *Cottam v. Currie*, 42 La. Ann. 875.

SELDEN v. CITY OF JACKSONVILLE.

[28 FLORIDA, 553.]

EMINENT DOMAIN — STREET IMPROVEMENT NOT AN APPROPRIATION OF PRIVATE PROPERTY. — A constitutional guaranty that private property shall not be taken without compensation does not extend to consequential damages resulting to abutting property from authorized or lawful changes of the grade of the street or other street improvement by municipal authority.

EMINENT DOMAIN — STREET IMPROVEMENT — WHAT NECESSARY TO A TAKING OF PRIVATE PROPERTY. — A trespass upon, or physical invasion of, property abutting on a street is necessary to bring municipal authorities, when improving streets, within a constitutional prohibition against taking private property without compensation. So long as such authorities keep within the scope of their powers in using or improving the street for street purposes, they are under no liability to abutting owners for any damage resulting from a change of grade or other improvement in the street, made for the convenience or benefit of the public in using it as such.

EMINENT DOMAIN — IMPROVEMENT OF DEDICATED STREET. — The voluntary dedication of a street as a highway constitutes it, to the extent that it is necessary to be used as a street, the property of the people of the state, and carries the continuing power to change its grade, or to otherwise improve it for street purposes. This power may be delegated by the legislature to municipalities, and to its exercise the abutting owner is at all times subject, without becoming entitled to additional compensation.

EMINENT DOMAIN — IMPROVEMENT OF STREETS. — INCIDENTAL RIGHTS OF ABUTTING OWNERS on streets to egress and ingress from and to the property by way of the street, and of light and air which the street affords, are not possessed by the public. These rights are protected by a constitutional prohibition against taking private property without compensation, subordinate only to the right of the state, or any authorized municipal or governmental agency acting for it, to alter the grade or otherwise improve the street for street purposes.

EMINENT DOMAIN — RIGHTS OF ABUTTING STREET OWNERS SUBORDINATE TO STREET IMPROVEMENT. — The original and all subsequent purchasers of property abutting on a street take with the implied understanding and agreement that the public shall have the right to improve or alter the street for street purposes, and that they can sustain no claim for damages resulting to their property from the impairment or destruction of their incidental rights of ingress and egress and of light and air, as a mere consequence from the use or improvement of the street as a highway.

EMINENT DOMAIN — IMPROVEMENT OF STREETS — WHAT DOES NOT CONSTITUTE APPROPRIATION. — So long as there is no application of a street to purposes other than those of a highway, and no diversion of it from street purposes, any changes of grade made lawfully and in good faith, of not maliciously, or for the purpose of doing injury to the abutter, are not within the constitutional prohibition against taking private property without compensation, nor the basis for an action for damages.

EMINENT DOMAIN — IMPROVEMENT OF STREETS. — CONSEQUENTIAL DAMAGES involved in the lawful improvement of a street for street purposes are merely the consequence of a legal act, and not a taking of property. They cannot form the basis for a recovery in the courts, nor of a lawful claim for compensation.

EMINENT DOMAIN — IMPROVEMENT OF STREETS — CONSTITUTIONAL LAW. — Under constitutional provisions that private property shall not be taken without compensation, and that the legislature may provide for the drainage of the land of one person over or through that of another upon compensation to the former, and that no private property or right of way shall be appropriated to the use of any corporation or individual without full compensation to the owner, irrespective of any benefit from any improvement proposed by such individual or corporation, a municipal corporation is not liable for consequential damages resulting to abutting property owners from a lawful change of the grade of the street by means of the erection of a viaduct, or other authorized improvement of the street for street purposes.

EMINENT DOMAIN — STREET IMPROVEMENT — ERECTION OF VIADUCT NOT APPROPRIATION WITHOUT COMPENSATION. — An authorized erection of a viaduct in a street, by a municipal corporation, for the purpose of changing the grade of the street for street purposes, is not a taking of the property of the abutting owner without compensation which entitles him to consequential damages, although his incidental rights of ingress and egress, light and air, are destroyed thereby, and other corporations besides the municipality have contributed to the expense of building such viaduct.

EMINENT DOMAIN — VIADUCT AS DIVERSION OF STREET FROM STREET PURPOSES — APPROPRIATION WITHOUT COMPENSATION. — Where the necessity for a viaduct in a street is created by railroad tracks crossing the street, the erection of such viaduct by a municipality, financially aided by the railroad company, would seem to be a diversion of the street from street purposes, and a taking of private property without compensation, which would entitle the abutting street owner to consequential damages.

A. W. Cockrell and Son, for the appellants.

W. B. Young and J. M. Barrs, for the respondent.

RANEY, C. J. The last clause in the twelfth section of the declaration of rights of our constitution is: "Nor shall private property be taken without just compensation." This is not, however, the only provision of that instrument relating to the exercise of the right of eminent domain. There are two sections in the Miscellaneous Provisions, or article 16, which read as follows:—

Sec. 28. The legislature may provide for the drainage of the land of one person over or through that of another upon just compensation therefor to the owner of the land over which such drainage is had.

Sec. 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be provided by law.

It cannot be denied that the almost uniform course of decision has been that a municipal government was not liable for any consequential damages resulting to dwelling lots from an authorized or lawful change of grade of the street by the municipal authorities, where the constitutional provision obtaining has been like that of our declaration of rights: "Nor shall private property be taken without just compensation." Such seems to have been this court's understanding of the law twenty years ago, as is shown by *Dorman v. Jacksonville*, 18 Fla. 538; 7 Am. Rep. 253.

The meaning given by the courts and commentators to the words "taken" or "appropriated," as used in such a provision, is, that there must be a trespass upon or a physical invasion of the abutting property to bring municipal authorities within the constitutional prohibition, so long as such authorities keep within the scope of their powers in using or improving the street. If they do no illegal act, as by creating a nuisance, or do not appropriate the street to other than street purposes, or do not invade or do physical injury to the abutting property, there is, in the absence of negligence, or of the want of due skill and care in making improvements (which negligence or want of care or skill may of itself be a ground of corporate responsibility for damages), no liability to the owners of such property for any damage resulting from a

change of grade or other improvement in the street made by the municipal powers for the convenience or benefit of the public in using the highway as such. The voluntary dedication of the street as a highway creates certain rights in the public; the land so dedicated becomes, to the extent that it is necessary to be used for a street, the property of the people of the state, and the dedication of it to such purpose carries, in this country, as well as in England, the continuing power to change its grade or otherwise improve it, in so far as such improvements are for street purposes. This power may be delegated by the legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the abutting owner in the street to its center is at all times subject, in the manner or to the extent indicated above, under a constitutional provision like that in our bill of rights.

In some cases holding these views, there has been an omission, at least, to notice any distinction between the rights of an abutting owner, as such, and the public generally in or as to the streets, but there can be no doubt that there is a substantial and clearly defined difference. There is incident to abutting property, or its ownership, even where the abutter's fee or title does not extend to the middle of the street, but only to its boundary, certain property rights which the public generally do not possess. They are the right of egress and ingress from and to the lot by the way of the street, and the right of light and air which the street affords. Viewing property to be not the mere corporal subject of ownership, but as being all the rights legally incidental to the ownership of such subject, which rights are generally said to be those of user, exclusion, and disposition, or the right to use, possess, and dispose of (Lewis on Eminent Domain, secs. 54, 55; Dillon on Municipal Corporations, sec. 587 b; Cooley's Constitutional Limitations, 675, 676), we are satisfied that the rights just mentioned are within the meaning of the word "property," as it is used in this constitutional provision. These incidental rights of property are under a constitutional guaranty simply against the "taking" or "appropriation" of property, subordinate to the right of the state, or any duly authorized governmental agency acting for it, to alter the grade or otherwise improve the streets for street purposes. An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street

so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the use or improvement of the streets as highways. Ohio and Kentucky alone, of all the courts of this country, have denied such subordination of these incidental rights to the highway rights of the public. The doctrine of the courts of the other states and of the United States is, that so long as there is no application of the street to purposes other than those of a highway, or no diversion of it from street purposes, any changes of grade made lawfully and in the exercise of good faith, or not maliciously, or for the purpose of doing injury to the abutter, is not within the constitutional inhibition against taking property without compensation, nor the basis for an action for damages: Lewis on Eminent Domain, sec. 96, and authorities cited in note; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253.

The Ohio doctrine, as summarized by Lewis in his work on eminent domain (sec. 98, pp. 121, 122), gives a right of recovery not only under the circumstances indicated above, but also where one builds to an established grade, and it is changed to his damage; or where one builds before a grade is established, but succeeds in anticipating the grade, which is afterwards established, and the grade, after being so established, is changed; or where one builds before a grade is established, and afterwards an unreasonable grade is established. The right of recovery is based in the later cases there upon the guaranty that private property shall not be taken for public use without just compensation (Lewis on Eminent Domain, 122), and the property taken is spoken of in these cases as the right of access. In the earlier cases, however, the ground of the decision was that of natural right and justice. Judge Dillon, in a note to his work on municipal corporations (sec. 990, p. 1226), says of the doctrine obtaining in this state, that the common-law measure of the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decision elsewhere.

In Kentucky, in the case of *Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 416, 96 Am. Dec. 243, the grade of the street was to be raised twelve feet above the mill company's lot, at the only point of ingress and egress, the improvement entirely closing the passway, and in *Newport etc. Bridge Co. v. Foote*, 9 Bush, 264, there was sufficient space left between the

appellee's lot and the bridge for two wagons to pass abreast, and in the former the abutting owner was held entitled to relief, on the ground that there was a taking of his private property, an interference with his private right of air, light, and passway, while in the latter relief was denied, as there was no interference with the private rights of the appellee, the lessening in value of his lots from the lawful construction of the bridge and the avenues leading to it being regarded as mere consequential damages, not constituting a cause of action. See also *Kemper v. Louisville*, 14 Bush, 87; Lewis on Eminent Domain, sec. 99; 2 Dillon on Municipal Corporations, note to sec. 990, p. 1226. Both Judge Dillon and Mr. Lewis treat the Kentucky doctrine as virtually making the extent of the injury, and not the fact of injury, the basis of municipal liability.

The provision of the Kentucky constitution is: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

In Ohio there are two sections on the subject in the constitution of 1851. They are the nineteenth section of the bill of rights, and the fifth section of the thirteenth, or "corporations," article, and they read as follows: —

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use, a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner": Bill of Rights, sec. 19, art. 1.

"No right of way shall be appropriated to the use of any corporation until full compensation shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law": Corp. Art., sec. 5, art. 13.

The courts of Ohio do not attempt to sustain their peculiar doctrine upon the theory that there is anything exceptional in the constitution of that state. They hold, as indicated above,

that there is a "taking" of property. As much as the decisions of Ohio have been discussed by other courts and by commentators, there can be found neither in those discussions nor in the decisions themselves any suggestion that the Ohio doctrine is referable to anything peculiar in the constitution of that state. The same is true of the Kentucky decisions.

It is not to be denied that much hardship has resulted to individuals in their property rights, from time to time, from the established doctrine, nor have the courts failed to appreciate these hardships. In *O'Connor v. Pittsburgh*, 18 Pa. St. 187, a case in which the city authorities reduced the previously established grade, with reference to which the church of the plaintiff had been constructed, and cut down the street seventeen feet in front of the church. Chief Justice Gibson, delivering the opinion of the court, said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none." Still, this doctrine has been so firmly established as law, based upon the principle of the rights of the state in highways and the immunity of itself, and of governmental agencies acting for it and for the benefit of the people, that, notwithstanding the departure of the Ohio courts, they have found themselves unable to ignore or change it, though suggestions have at times fallen from them as to the advisability of the law-making power doing so. These suggestions, and doubtless a growing sense of the harsh consequences of the doctrine, have led to not only legislative action, but also to changes in the organic law of many states, as shown by the constitutions of Pennsylvania of 1873, and that of Alabama of 1875, by which it is provided that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed, and that of Arkansas of 1874, providing that private property shall not be "taken, appropriated, or damaged," and those of Illinois of 1870, West Virginia of 1872, Missouri of 1875, Colorado and Texas of 1876, Georgia of 1877, and California of 1879, that it shall not be "taken or damaged." The purpose and the effect of this introduction of the words "injured," "destroyed," or "damaged" was to give compensation for damages often resulting to private property where there was not a "taking" of the property. There being no taking of private property, and consequently no infraction of the constitutional guaranty

against taking without making just compensation, there were yet, as just intimated, many cases in which damages resulted to property owners, although the works or improvements were constitutionally authorized by the law-making power of a state, and carefully and skillfully executed by governmental agencies. Such damage, not being occasioned by any illegal or wrong act, has found expression in the phrase, *Damnum absque injuria*. It has also become the custom to speak of such damages as consequential damages, meaning that they are simply the consequence of a legal act, and therefore are not a basis of recovery in the courts, nor of a lawful claim for compensation. It seems not to have been the purpose of these amendments to give a right of recovery for all damaging consequences resulting from the improvement to the owner of the property affected, but only for such as affect physically some right of property incident to the abutting property.

This is illustrated by the cases of *Edmundson v. Pittsburgh etc. R. R. Co.*, 111 Pa. St. 316, *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, *Chester Co. v. Brower*, 117 Pa. St. 647, 2 Am. St. Rep. 713, *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, *Pennsylvania etc. R. R. Co. v. Walsh*, 124 Pa. St. 544, 10 Am. St. Rep. 611, cited by appellant's counsel, and which are decisions under the new provision of the constitution of Pennsylvania, referred to above. This provision, so far as it need be given now, is as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." The first case was an action for damages done to plaintiff's buildings and land by negligent blasting and the reckless and careless construction of the road by the contractors. The company had been given the right to enter and construct, and did not enter or construct under the right of eminent domain. It was held, upon the facts of the case, that the company was not liable for the negligence of its contractor, who was exercising an independent employment, and to whom the maxim *respondeat superior* applied; and that a railroad company to which one grants the right to enter upon his land and construct a road is not liable for damages resulting as a consequence of the company's en-

tering and constructing; and that the above provision of the constitution did not apply to damages resulting from carelessness or negligence in constructing a railroad. "The words 'injured or destroyed,' as found in this section, as every one knows," says the opinion, "were not designed to change, alter, or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages from which they had been previously exempt. . . . To create a liability for injuries of this kind, and to make corporations responsible for such damages, was the object, and only object, of the section under discussion." In the second of the above cases (*Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618), a railroad company erected on its own land a viaduct, and operated a railroad thereon, and it was held that there could be no recovery for damages resulting to plaintiff's property, lying on the opposite side of the street, from noise, smoke, and dust, the necessary consequence of a due operation of the railroad, no portion of his property having been taken or used in the construction of the viaduct; and that, except on proof of negligence, the lawful use by a railroad company of a lawful erection entirely upon its own property was not the subject of damages, under the above section of the constitution. It was said by the court, that none of the plaintiff's property had been taken, nor any of his rights infringed, so that neither by the constitution nor by the case quoted was there warrant for his contention; that over and beyond the damage which arises from the taking of the property, whether in the shape of land or a right, the constitution imposed on corporations a direct responsibility for every injury for which a natural person would be liable at common law, and that this was held in the preceding case, but that beyond this they could not go. The third of the above cases (*Chester Co. v. Brower*, 117 Pa. St. 647; 2 Am. St. Rep. 713) is one in which the county erected a bridge with stone abutments and piers on a street and over a creek in a borough. The approach or abutment of the bridge was of solid masonry, and extended in front of Brower's lot and house. It is stated that the street could no longer be used except for travel on foot, the travel now passing over the approach and upon the bridge. The conclusion reached was, that the county was liable in an action on the case for the consequential damages to the property, and this, though the legislature had not provided a remedy to enforce the right

given by the provision of the constitution. "There was," observes the opinion, "no taking of the property of the plaintiff by the county for the purpose of constructing the bridge. . . . The claim was for consequential damages caused by the erection of the abutments of the bridge some fourteen feet above the grade of the street in front of the plaintiff's house. It follows that under the law as it stood at and prior to the adoption of the constitution he would have been without remedy: *Struthers v. Dunkirk etc. R'y Co.*, 87 Pa. St. 282, and cases there cited. The constitution of 1874 made a radical change in the law as regards consequential injuries." In the fourth case (*Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659), in which the facts were quite similar to those in the second case, the decision was, that the mischief which the constitutional convention had before it in adopting the above section was the want of a remedy under previous constitutions to obtain compensation when property was injured or destroyed in the construction or enlargement of corporate works, though no portion of it was actually taken by the corporation; and that the remedy provided thereby, to secure just compensation by corporations for property "injured or destroyed," has relation to injuries which, though properly termed consequential, are yet to be understood as confined to such injuries to one's property as are actual, positive, and visible, and are the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the constitution, in advance; that a railroad corporation which has constructed its railroad on its own property in a city without taking any portion of another's property is not liable for those indirect injuries which are the result merely of the operation of its road in a lawful manner, and without negligence, unskillfulness, or malice; that the provision was not intended to impose on corporations a liability in the operation of their works which has never been imposed on individuals. The remaining case (*Pennsylvania etc. R. R. Co. v. Walsh*, 124 Pa. St. 544; 10 Am. St. Rep. 611) decides that where a railroad is laid down upon a public street, and, though at grade, is so constructed, with reference to the property of an abutting owner, that by its operation in a lawful manner access to the property, if not cut off, is rendered dan-

gerous, the company is liable for consequential damages, under the constitution. The distinction between this case and those of Lippincott and Marchant is, that in the latter there was no injury by reason of the construction of the road, whereas here it was the direct result of the construction, the track being laid close to the curbstone on the side of the street next to plaintiff's property, with the effect indicated. See also *Pennsylvania etc. R'y Co. v. Ziemer*, 124 Pa. St. 560. The case cited from Alabama (*City Council of Montgomery v. Maddox*, 89 Ala. 181) holds, under a constitutional provision similar to that of Pennsylvania omitting the words "or secured," that the liability of a municipal corporation extends to all cases of injury caused by grading or cutting down streets or sidewalks, without regard to the original dedication or condemnation, or to damages paid on former occasions, the measure of damages in every case being the difference in the market value of the property before and after grading.

There is, in these Pennsylvania and Alabama decisions, nothing, considering the provisions of our constitution, that aids appellants.

We are unable to find, in either or all of the three sections of our constitution, a justification for the theory of appellants' counsel that the use of the term "right of way," in the last of the three sections, was intended as an adoption of the rule allowing indirect or consequential damages. We do not doubt that the abutting owner's right of access, or of ingress and egress from and to the street, and of light and air from the open space above or over the surface of the street, are easements and private property incidental to the ownership of the abutting lot, nor that these easements cannot be "taken" or "appropriated" without just compensation being made for them as such property. This is fully demonstrated by the New York elevated railroad cases (*Story v. New York etc. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146 (decided in 1882); *Lahr v. Metropolitan etc. R'y Co.*, 104 N. Y. 268; *Abendroth v. Manhattan R'y Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461), hereafter to be noticed, and by other authorities, as indicated both above and hereafter.

Whatever meaning we give to the expression "right of way," we still find nothing in the constitution that places it within the protection or inhibition of that instrument, unless such right of way is "taken" or "appropriated." These words, "taken" and "appropriated," it seems to us, were used in

their well-defined sense, and in no other. There is nothing in the proceedings of the constitutional convention which justifies an inference that these words were used in any other sense, or that the framers of that instrument intended to give compensation for damages or injury other than such as should result from a taking or appropriation, as distinguished from consequential damages.

An examination of these proceedings proves that the clause of the bill of rights was adopted on the third day of July, and without anything to distinguish its consideration: Jour. Const. Conv. 1885, pp. 229, 230.

The first time anything like section 29 of article 16, Miscellaneous Provisions, appears to have been brought to the attention of the convention was the eleventh day of the same month, and in the seventh section of an article reported by the minority of the committee on private corporations. The majority had recommended two sections to constitute an article to be entitled "Private Corporations," and substantially the same as those finally adopted July 21st, and now constituting sections 30 and 31 of article 16, they being intended to prevent unjust discrimination and unjust charges by common carriers and others performing service of a public nature, and prohibiting common carriers from granting free passes or discounting fares of members of the legislature and salaried officers of the state. The seventh section of the article reported by the minority of the committee as an article to be entitled "Private Corporations" uses the words "no property," instead of "no private property nor right of way," and does not use the word "individual." This minority report was indefinitely postponed on the 18th of July, notice of motion for a reconsideration of the vote being given.

On the twenty-first day of July, the sixteenth article being under consideration, the following were offered as additional sections, and were referred to the committee on miscellaneous provisions:—

"The right of drainage, and the means to secure it, shall be promoted and protected, and the right of way through inferior lands for the drainage of superior by the direct as well as by the natural course shall be provided for and enforced; provided, that the cost and damage of such easement may be assessed in proportion to benefit upon the lands of the parties applying for the same; and provided further, that the owners

of lands bearing the servitude shall be entitled to just compensation from the parties so applying."

"The right to collect rates or compensation for the use of water supplies to any county, city, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The committee, on the 24th of July, reported these sections back to the convention, recommending the former to the favorable consideration of the convention, but the latter "without recommendation," and on the next day they were referred to the judiciary committee. On the 29th of the month, this committee reported as a substitute for the same what is now section 28 of article 16 as it is given above, it having been adopted by the convention on the last day of July.

On the 24th of July, article 16 being under consideration, there was offered a section to be entitled "Private Property, how Taken for Public Use," the first paragraph of it being: "No private property of persons or corporations shall be taken nor damaged, for public use, in the construction of railroads, canals, or if taken for other purposes, under chartered rights, without just compensation to be paid for the same." This proposed section was also referred to the committee on miscellaneous provisions, and on the twenty-eighth day of that month it reported as a substitute for the same what is now section 29 of article 16, as given at the outset of this opinion, it having been adopted on the last day of July.

These proceedings, if they indicate anything, tend to the conviction that the purpose of the convention was, as shown by its final action, to exclude from the constitution any provision for compensation for damage other than where there was a taking or appropriation of property. If such was not the intention, the word "damaged," or its equivalent, would have been put in section 29, such word being in the proposed provision for which it was a substitute.

It is not to be assumed that the judges and lawyers who sat in the convention did not understand what the meaning of the words "taken" or "appropriated" was then, which it is now, or did not know that the abutting owner's right of access and other easements indicated were private property. The expression "private property," in so far as we can see, certainly includes any right of way which is the subject of private property, and unless the words "right of way" mean a public right of way, we can find in them nothing that adds to the effect

which the expression "private property," or the entire section, would have without them. We, however, do not mean to intimate that the expression "right of way" includes or applies to a mere public right of way; and we may remark that it does not occur to us that the purpose of the section in which these words are to be found was so much to specify what should never be taken without just compensation, as it was to declare the cases in which there shall be no taking without either previous payment, or a security, by deposit of money, of the compensation for such taking, ascertained in the manner indicated. It is entirely clear that the state acting for itself is not, even if a municipal corporation is, within the terms or spirit of this section, in so far as it prescribes anything not implied by the more general provision of section 12 of the declaration of rights. We state these views, not as committing ourselves finally to the meaning of the words "right of way" in connection with any future case distinguishable from this, nor as precluding the recognition of any now undiscovered legal effect they may have been intended to establish: *Giesy v. Cincinnati etc. R. R. Co.*, 4 Ohio St. 308, 328 et seq.

The New York elevated railroad cases, mentioned above, and decided under a constitutional provision similar to that in our declaration of rights, are relied upon as sustaining the appellants' cause. In the second of these cases (that of *Lahr v. Metropolitan Elev. R'y Co.*, 104 N. Y. 268), the conclusions of the Story case are stated to be, in effect, as follows: 1. That an elevated railroad in the streets of a city, operated by steam and constructed as there described (about fifteen feet above the surface of the street, supported on columns placed along and partly inside of the outer edge of the sidewalk, and about eleven feet from Story's building,—a warehouse,—and extending across the whole traveled track of the street, the structure and passing trains to some extent, as found by the trial court, obscuring the light and impairing the usefulness of the premises, and the line of columns abridging the sidewalk, and interfering with the street as a thoroughfare), was a perversion of the use of the street from the purposes from which it was originally designed, and a use which neither the city authorities nor the legislature could legalize or sanction without provided compensation for the injury inflicted upon abutting owners; 2. That abutters upon a public street, claiming title to their premises by grant from the municipality, it covenanting that a street to be laid out in front of the premises should forever

continue for the free and common passage, and as public streets and ways, for all persons passing or returning through or by the same, in like manner as the existing streets in the city are or ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon; 3. That the ownership of such easement is an interest in the real estate constituting property, within the meaning of that term as used in the constitution, and for which compensation must be made before it can be lawfully taken; 4. That the erection of an elevated railroad, the use of which was intended to be permanent, in a public street, and upon which cars are propelled by steam-engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitute a taking of the easement and its appropriation by the railroad corporation, rendering it liable to the abutters by the damage occasioned by such taking.

It was further held in Lahr's case, that no legal difference exists with reference to the interest acquired by abutting owners in a public street where the title is like that held by Story, and where it is one acquired through mesne conveyances from the original owner whose property has been taken by proceedings *in invitum* instituted by the municipality under a public statute for acquiring land for street purposes, — such statute providing that the land thus taken shall be held "in trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street, . . . forever, in like manner as the other public streets . . . in said city are and of right ought to be." In *Abendroth v. Manhattan R'y Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, the decision was, that though the title of the owner of the abutting lot extends only to the side of the street, and the owner thereof has no interest in the street except as the owner of such abutting lot, he has incorporeal private rights in the street which are incident to his lot, and are private property within the meaning of the constitutional provision forbidding their being taken for public use without just compensation, and that it is no justification to their impairment that the act complained of is done pursuant to legislative authority.

It is apparent, from the above statement of these decisions,

and no one giving a careful and fair consideration of the opinions can fail to be so impressed, that the appropriation of the streets to the use of such railroads is held to be a diversion of the streets from highway purposes, to the new and inconsistent purpose of an elevated railroad, and that this diversion is what, in the judgment of the court, constitutes the legal invasion and unlawful taking or appropriation of the easements incident to the abutting lot; and it is equally apparent upon the face of the opinions, that the doctrine they sustain is not and was not intended to conflict with the views announced in the previous portions of this opinion as to the power of a municipality over streets, so long as it does not divert the street from the original purposes for which it was established, or seek to apply it to other than street uses. The importance of the principle and interests involved justify proofs of this assertion by extracts from the opinions. Answering the argument of the railroad company, made upon the basis of *Northern Trans. Co. v. Chicago*, 99 U. S. 635, where the claim against the city was for damages for an obstruction to the plaintiff's docks, by the deposit of materials, the construction of a coffer-dam, and other work necessary to the building of a tunnel for the extension of a street, it is said, in Story's case: "The work was a necessary city improvement, and the interruption and obstruction was temporary, ceasing with the completion of the work. It was held that the plaintiff could not recover, and this upon the principle applied and practiced upon in all our cities, that the municipality, whether owners of the fee of the street, or vested with an easement only, may repair or improve it 'to adapt it to easy and safe passage.' It permits the leveling of a street by filling up or digging away, and if intersected by a stream, the erection of a bridge or tunnel. If in doing either of these things, materials are necessarily collected, or an excavation made, to the present and temporary detriment of a lot-owner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience, in order that the street may be preserved. So in placing a pavement or excavating for a sewer, the stone for the one or the dirt from the other may, for a time, inconvenience the lot-owner. To this, in like manner, he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue." Again, it is observed: "It is, no doubt, true that the grade of a street or highway may be altered by raising it or lowering it, without liability

on the part of the municipality to the abutter, but this is on the ground that the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended, but the elevation of a structure, useless for general street purposes, and as foreign thereto as the house in Vesey Street: *Corning v. Lowerre*, 6 Johns. Ch. 439; or the freight depot: *Barney v. Keokuk*, 94 U. S. 324. And speaking of the surface railway cases (*People v. Kerr*, 27 N. Y. 188, and *Kellinger v. Forty-second Street etc. R. R. Co.*, 50 N. Y. 206), it is said: "The use of streets permitted was not inconsistent with the purposes of the trust." It is also remarked, in the opinion delivered by Judge Tracy (*Story v. New York Elev. R. R. Co.*, 90 N. Y. 170; 43 Am. Rep. 146), that while the legislature may regulate the uses of the street as a street, it has no power to authorize a structure thereon which is subversive of and repugnant to the uses of a street as an open public street, and that whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of a street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized. In Lahr's case it is observed that an abutting owner necessarily enjoys certain advantages from the open street, which belong to him by reason of the location of his property, and are not enjoyed by the general public, such as the easements referred to above, and that they are not only valuable to him for sanitary purposes, but indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising a fund necessary to defray the cost of constructing the street; and that he is compelled to pay for these advantages and rights at their full value, and if in the next instant they may, by legislative authority, be taken away, and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

And it is also further said that the right which the municipality acquires is limited by the public necessity, and, in the case before the court, could not extend beyond its use for street purposes; and all other uses which might be enjoyed therein consistent with its use as a street must from necessity have remained in and resided with the person from whom it

was taken, even after the transfer of the fee to the municipality. Afterwards, it is declared that "the logical effect of the decision in the Story case is to so construe the constitution as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses are obviously within the power of the legislature to enact, but questions arising under such legislation are inapplicable to the questions here involved. Such are the cases in respect to the changes of grade; the use of a street for a surface horse-railroad; the laying of sewers and gas and water pipes beneath the soil; the erection of street-lamps and hitching-posts, and of poles for electric lights used for street-lighting. All of these relate to street uses, sanctioned as such by their obvious purpose and long-continued usage, and authorized by the appropriation of land for a public street": *Lahr v. Metropolitan Elev. R'y Co.*, 104 N. Y. 291-293.

These extracts clearly sustain the assertion in behalf of which they are invoked.

The practical deduction to be made from the preceding discussion is, that if what is sought to be enjoined is only an application of the street to additional street purposes, there is, in the absence of any physical invasion of the abutting lots, no taking or appropriation of any property or right of way of complainants, within the meaning of the prohibition of the constitution. Without intimating what effect allegations charging malice, negligence, or unskillfulness would have in an equitable suit of this character, it is clear that there are no such allegations in the record.

The theory of the bill is, that the viaduct is being erected by the four railroad companies and the county of Duval and city of Jacksonville under and in accordance with the agreement there set out, and that the purpose of the agreement was to erect the viaduct over and above the numerous railroad tracks crossing said street, and to put the street-railway on the viaduct, and make the surface of the viaduct, instead of the original surface of the street, the grade for the passage of the public as they should come and go. It would be idle to contend that the complainants are not damaged, at least con-

sequentially, independent of any benefits which may accrue from the improvement. In so far as we can understand the facts, they are to be completely shut in and cut off from any communication with the other portions of Jacksonville and the rest of the world, except by the St. Johns River, unless they shall, at their own expense, construct some way to reach the surface of the viaduct from their lots or improvements on the same, and there will be also an abridgment of light and air. The appellants' case, however, presented by the record before us, is not that the necessity of constructing the viaduct was produced by the laying of railroad tracks across Commercial Street, and that as a result of such railroad construction, that portion of said street was converted by the municipal agency into other than street purposes, and the object of the viaduct was to accomplish this end. We express no opinion on such a case, as it is not presented. If it be that the construction of this viaduct under and pursuant to the agreement is a diversion of the street from its highway purposes, there can be no doubt or question that there has been a taking of complainants' easements without compensation, and in violation of the provision of the bill of rights, and of section 29 of article 16 of our organic law; but, under the state of the pleadings and the manner of the submission of the cause before us, we cannot consider this question, but are confined to a judgment of the case as one in which the municipal government of Jacksonville is erecting the viaduct, not as a joint party with the others to the agreement, and acting under it, to meet a result necessitated by the existence of the railway track, but in the exercise of its chartered powers to change the grade of the street, though under an agreement with the several parties named as co-defendants, by which they are to contribute to the expense of the construction of the viaduct, by which the grade will be so changed. It is not contended that if the conditions exist which will justify the city, in the exercise of its powers as such, to change the grade of the street, that the change cannot be made by means of a viaduct, nor that the street conditions are not such as authorize the city to erect a viaduct for the purpose of changing the grade, if it has power to do so without first compensating complainants for the alleged taking of or damage to their property. The city, appearing alone, has tendered issue upon the theory that it is doing the work of itself, and under and by virtue solely of its own organic powers to grade streets, with, it is true, pecuniary aid

from the parties named as co-defendants, and complainants have accepted the issue, and contend that the city has not, under its charter and the constitution of the state, power to change a grade of a street without first making compensation for damages resulting from an interference with the complainants' easement of access, light, and air, although there is no encroachment upon or invasion of complainants' premises.

The charter act, chapter 3775 of the statutes, approved May 31, 1887, provides, in section 4 of article 3, that the mayor and city counsel shall have power by ordinance to make appropriations to alter, widen, extend, grade, or otherwise improve, clean, and keep in repair streets, alleys, and sidewalks, and also enacts that it shall have power, in like manner, to take and appropriate grounds for widening streets, or parts thereof, when the public convenience may require it, provided the owner or owners thereof shall receive compensation for the same. The act further provides (sec. 8, art. 5) that the board of public works shall have exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving of all streets, and to fix and establish the grades of all streets and alleys, avenues and thoroughfares. These provisions give full power to fix and change the grade of streets, and they do not provide that any compensation shall be made by the city to abutting owners for any taking of or damage to their property in fixing or changing the grade, and hence none can be required of the city against its will, or in the absence of a binding stipulation, unless there is a diversion of the street from street purposes, or other appropriation of the abutter's property, within the meaning of the constitutional provision heretofore mentioned.

The fact that a street-railway may be put on a viaduct which a city lawfully erects as a means of duly grading a street will not render the viaduct, otherwise or alone, a diversion of the street from highway purposes, or be a ground for enjoining the erection of the viaduct for street purposes, even if the erection of the viaduct for the purpose of such a railway would be a diversion of the street and the subject for an injunction. The construction of a viaduct for street purposes should not be interfered with, although the subsequent erection thereon of a street-railway should, when about to be begun, be the subject of an injunction.

If the viaduct is being erected under the agreement, among other purposes, for that of a street-railroad, or if it is being

erected under the agreement for the purposes of carrying the street over the railroad tracks, which railroad companies are authorized under certain circumstances to do, but whether independent of or subject to the constitutional provision as to making compensation for taking the easements of abutting owners we do not say, the railroad companies were entitled to be heard. No such case has, however, been made before us. We have discussed and decided the only case presented, and our judgment is, that the order refusing the injunction was proper, and should be affirmed.

It will be ordered accordingly.

EMINENT DOMAIN — MUNICIPAL CORPORATION — LIABILITY FOR IMPROVING STREETS. — A city, while properly improving its streets, is not liable to an owner of land indirectly injured thereby, when such injury is a necessary result of such improvement: *Bush v. Portland*, 19 Or. 45; 20 Am. St. Rep. 789, and note. A municipal corporation is not liable for consequential damages caused by the grading and improving of its streets, unless the work was negligently done: *Davis v. Craigsfordville*, 119 Ind. 1; 12 Am. St. Rep. 361, and note in which a large number of cases are collected; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719, and extended note; *Green v. Reading*, 9 Watta, 382; 36 Am. Dec. 127, and note. *Smith v. Eau Claire*, 78 Wis. 457, and *Valparaiso v. Adams*, 123 Ind. 251, declare this to be the rule, in the absence of a statute rendering municipalities liable for such damage. This rule is also discussed in a note to *Dorman v. Jacksonville*, 7 Am. Rep. 260. A land-owner who joins in a request to the authorities of a borough to grade a street is not estopped to claim damages for injury done to his property by such grading: *Jones v. Bangor*, 144 Pa. St. 638. A complaint which charges that a city raised the grade of a street so as to set back the water in the gutter in front of plaintiff's property, causing it to discharge into and upon his premises, states a case of actionable negligence: *Rice v. Flint*, 67 Mich. 401.

PROPERTY IS "DAMAGED FOR PUBLIC USE," within the meaning of the constitutional provision, when an abutting proprietor is injured by the establishment of the grade of a street or the altering of an established grade: *Sheehy v. Kansas City etc. Ry Co.*, 94 Mo. 574; 4 Am. St. Rep. 396, and extended note. See also *Vanderlip v. Grand Rapids*, 73 Mich. 522; 16 Am. St. Rep. 597, and extended note; *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779.

DEDICATION OF STREET — EFFECT OF. — When a street is dedicated to the public, the fee vests in the public only when the statute so provides, and in all other cases the owner retains his right to the soil for every purpose not inconsistent with the public easement: *O'Neal v. City of Sherman*, 77 Tex. 182; 19 Am. St. Rep. 743, and note; *Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358, and note. An owner can only recover for such damages as are caused by the doing of acts which were not within the purview of the original dedication: *City Council v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112. Where the owners of land dedicate a street adjacent thereto to be kept open for the use of the grantors, their heirs or assigns, their grantees have a right of way which cannot be impaired by legislation allowing a railroad company

to occupy it without making compensation: *Methodist etc. Church v. Pennsylvania R. R. Co.*, 48 N. J. Eq. 452.

EMINENT DOMAIN — EASEMENTS OF ABUTTING OWNERS ON STREETS. — The owner of a lot abutting on a public street has, independent of the ownership of the fee of the street, an easement in the street to its full width, for the admission of light and air, which is subordinate only to the right of the public in the street, and to deprive him of such easement would be the taking of his property for public use: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *contra*, see *Olney v. Wharf Co.*, 115 Ill. 519; 56 Am. Rep. 178. Simply rendering the ingress or egress to or from property inconvenient or expensive by the grading of a street is not such damage as can be recovered for: *Trustees v. Spears*, 16 Ind. 441; 79 Am. Dec. 444; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392, and note.

DEDICATION — RESTRICTION TO PURPOSE FOR WHICH DEDICATED. — Where property is dedicated for a certain purpose, it must be restricted in its enjoyment to that purpose, and cannot be diverted to use for other and different objects: *McKinney v. Griggs*, 5 Bush, 401; 96 Am. Dec. 360, and note; *Fulton v. Short Route etc. Transfer Co.*, 85 Ky. 640; 7 Am. St. Rep. 619, and note; note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 612.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS

STUBBINGS v. EVANSTON.

[125 ILLINOIS, 57.]

LANDLORD AND TENANT.— A TAKING OF A PART OF LEASED PROPERTY, in the exercise of the right of eminent domain, does not release the tenant's liability to pay rent for the entire estate according to the terms of the lease.

EMINENT DOMAIN.— A TENANT OF REAL PROPERTY holds his term subject to the right of the public to take a part or the whole of it for public use at such time as the public necessity may require, upon payment of just compensation; and in estimating such compensation the tenant must be regarded as having an estate in the property, measured by his original lease, and for which he remains liable to pay rent as in such lease stipulated.

LANDLORD AND TENANT.— IF A TENANT, IN PROCEEDINGS IN THE EXERCISE OF THE POWER OF EMINENT DOMAIN, is awarded the full value of his leasehold interest to the end of his lease, and the payment of the award to the tenant may leave the landlord, on account of the insolvency of the tenant, without remedy to collect the rent which will accrue upon the lease, a court of equity may interpose and appropriate so much of the award as may be necessary to satisfy the demands of the landlord.

EMINENT DOMAIN.— A NEW TRIAL MAY BE GRANTED TO A TENANT in eminent domain proceedings without extending the same privilege to his landlord, both having been awarded compensation for their respective interests, and the award in favor of the tenant being erroneous, while that in favor of the landlord was correct.

Hoyme, Follansbee, and O'Connor, and Robert H. Patten, for the appellant.

George S. Baker, for the appellee.

CRAIG, J. This was a proceeding brought by the village of Evanston to condemn certain property owned by appellant, Wilson H. Stubbings, for the purpose of extending the lake

shore drive. Appellant's property was located on the lake shore and north of Dempster Street, extending from the lake shore along the north side of Dempster Street 411 feet, and being 192 feet deep north of Dempster Street. Under the petition, the village sought to condemn a piece of land one hundred feet wide northwesterly through the property. Appellant's property was leased to one David O'Leary, who used the property for a coal-yard and a place for landing coal. The lease does not expire until 1898. The appellant and O'Leary were made parties to the proceeding. Both filed a cross-petition, appellant claiming damages to the property not taken, and O'Leary claiming damages to his interest in the part not taken. As a result of the trial, the jury returned a verdict in favor of appellant for \$5,450, as damages for the property taken, and that he was entitled to no damages as to property not taken. The jury also returned a verdict in favor of O'Leary for three thousand dollars, for damages to his leasehold interest in property taken, but that he was entitled to nothing as to property not taken. Appellant and O'Leary both applied for a new trial. The application of the former was denied, but that of the latter allowed.

On the trial of the cause, the court refused to instruct the jury, that if the strip of land and buildings in question are taken for the purpose of the driveway, the rental to be paid by O'Leary under his lease will be abated to the extent of the fair rental value of the lands so taken; that the value of O'Leary's leasehold estate in the premises was a sum equal to the difference, if any, between a fair rental value of the demised premises for the balance of his term and the amount of rent which he would have to pay therefor under his existing lease thereon. But, on the other hand, the court gave to the jury an instruction as follows: "When the owner of property makes a lease to a tenant, he conveys an estate in the property known as a leasehold estate, and such estate is in law entirely separate and distinct from the estate that the landlord retains. In case part of the property is taken under such proceedings as these, the tenant remains bound to pay rent for the whole, according to the terms of the lease. In this case the petitioner must pay to the landlord an amount equal to the value of his estate in the strip of property taken, and an amount equal to whatever damage, if any, is done to his estate or interest in the remainder; and the petitioner must also pay to the tenant an amount equal to the value of the tenant's estate in the strip

taken, and an amount equal to whatever damage, if any, is done to the tenant's estate or interest in the portion of the property not taken."

The ruling of the court on the instructions is relied upon as error. Indeed, the ruling in this regard is the principal question presented by the record.

The general rule no doubt is, that eviction of the lessee from the premises by a paramount title will discharge him from the payment of any rent which may fall due, by the terms and conditions of the lease, after eviction. But where a part of leased premises may be taken under the power of eminent domain, can such a taking be regarded as an eviction? Washburn, in speaking on this subject, says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises, where lands under lease have been appropriated to public use under the exercise of eminent domain. . . . But the better rule, and one believed to be adopted in most of the states, is, that such a taking operates, so far as the lessee is concerned, upon his interest as property, for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate according to the terms of his lease; and this extends to ground-rent. Such taking does not abate any part of the rent due": Washburn on Real Property, 342.

Parks v. City of Boston, 15 Pick. 198, is an interesting case on the question. It was there held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston, for the purpose of widening a street, the lease is not thereby extinguished, nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them, respectively." The same principle was announced in an earlier case: *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; and in a later case: *Patterson v. City of Boston*, 20 Pick. 159.

In *Footle v. City of Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737, where the leased premises had been appropriated for a street, the supreme court held that the lessee was not relieved from the payment of rent, but he was entitled to recover from the city for the damages sustained. See also the following cases, where the same principle is announced: *Workman v. Mifflin*, 30 Pa. St. 362; *Frost v. Earnest*, 4 Whart. 86; *Garrity v. City of Chicago*, 7 Brad. App. 474.

Under the authorities, it seems that a tenant, where a portion of the leased premises is taken, under the power of eminent domain, for the use of the public, cannot, as against his landlord, claim an eviction, and be released from the payment of rent, and as his liability for the payment of rent continues after a part of his term has been taken by the public and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of his leased property by the public. In other words, the lessee takes and holds his term in the same manner as any other owner of real property holds his title, subject to the right of the public to take a part or the whole of it for public use, at such time as the public necessity may require, upon the payment of just compensation.

In a proceeding to condemn lands for a public purpose, it is not some particular interest which the public seek to take, but the land itself. If A has one estate in the land and B another, in the proceeding to condemn, each is entitled to compensation for the land taken, as his interest may appear in the property; and, as said before, if one has a leasehold interest, he may recover damages for such interest and still be held liable for the payment of rent, as that liability existed before the leasehold interest was taken for public use. A different rule has been adopted in some states, particularly in Missouri: *Biddle v. Hussman*, 23 Mo. 597; *Barclay v. Pickles*, 38 Mo. 143. In those cases it was held, that as to the part of the leased premises appropriated to public use the rent was extinguished, and no liability existed against the lessee for such rents. But we think that the weight of authority is the other way, and we are not disposed to adopt a rule of that character.

It is, however, contended, if the tenant is allowed to recover for the full value of the leasehold interest, and the landlord is compelled to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would in many cases result in great loss to the landlord. In a proceeding to condemn a part of leased premises, the rule which we have adopted fixes the relative amount of damages to be recovered by each party interested in the premises; and if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages recovered

into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run. What rule should be adopted in case the entire tract or lot of land embraced in a lease should be taken, presents a question which does not arise on this record, and it will not be necessary to express an opinion upon it.

It is also claimed that the court erred in granting O'Leary a new trial and refusing appellant a new trial. This is predicated on the position that the two could not have separate trials, but the court was bound to try the case of O'Leary and appellant as one cause. In a proceeding like this, to condemn lands for a public purpose, while all persons made parties to the petition are usually treated as one defendant, and the interests of all are tried and disposed of in one case, yet cases may arise where the court may award separate trials, as held in *Bowman v. Venice etc. R'y Co.*, 102 Ill. 464. Here the rights and interests of O'Leary and appellant were tried together as one cause, but there were separate verdicts as to each. The verdict in favor of appellant the court thought was right, while the other verdict—in favor of O'Leary—the court thought was wrong. Under such circumstances, the court could do nothing but grant a new trial in favor of O'Leary, and refuse it as to appellant.

It is also claimed that the verdict was contrary to the evidence. The evidence was conflicting, and it was for the jury to determine, from all the evidence, the amount appellant was entitled to recover. This they did, and after an examination of the evidence, we are not prepared to say that the verdict is contrary to the preponderance of the evidence.

Some other questions of minor importance, in regard to the admission of evidence, have been raised, but we perceive no objection to the ruling of the court in this regard.

The judgment of the county court will be affirmed.

LANDLORD AND TENANT—EMINENT DOMAIN—EFFECT OF TAKING PART OF LEASED PREMISES UNDER.—In *Commissioners v. Johnson*, 66 Miss. 248, it was held, that where a portion of leased premises were taken under the power of eminent domain, it operated as an apportionment of the rent, and dissolved the relation of landlord and tenant *pro tanto*. The rule there laid down seems to be contrary to the majority of the cases cited therein, which hold that the landlord can recover only for the damage to his reversion, and must look to the tenant for his rents, while the tenant, on the other hand,

receives compensation for his loss of the rental value of the part of the leased premises taken, and must continue paying rent for the entire premises. The Mississippi court, in this case, accepted the doctrine of *Biddle v. Hussman*, 23 Mo. 597, cited therein, which seems to be the simpler solution of the question, for the reason that a multiplicity of suits is thereby obviated.

PLUME AND ATWOOD MANUFACTURING COMPANY v. CALDWELL.

[128 ILLINOIS, 162.]

JURISDICTION. — IF TWO OR MORE COURTS HAVE CONCURRENT JURISDICTION over the same subject-matter, the court first acquiring jurisdiction by the service of process will retain it, to the exclusion of the other.

JURISDICTION TRANSFERRED BY CONSENT. — Though a court has acquired jurisdiction over property by its seizure under its process, yet the parties interested may stipulate that the property shall be surrendered to another court, and after such surrender the latter acquires jurisdiction, which it may exercise to the same extent as if it had been the first to obtain jurisdiction.

JURISDICTION — ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. — IF, AFTER PROPERTY HAS BEEN ATTACHED by valid process against its owner, he makes an assignment for the benefit of his creditors, the court under whose writ the attachment was effected acquires jurisdiction over such property, and no other court can divest it of such jurisdiction or authorize the property to be taken from its officer; but if the plaintiffs in the attachment stipulate that the assignee for the benefit of creditors shall take possession of the property, and that it shall pass to him, subject to their liens, the property passes from the jurisdiction of the court under whose writ it was attached to the court having jurisdiction over the assignment for the benefit of creditors, and the latter, therefore, is the only court having power to ascertain and declare the rights and liens of the respective parties in such property.

ATTACHMENT, BURDEN OF PROOF TO SUSTAIN. — In a proceeding before a county court in Illinois, in the exercise of jurisdiction over assignments for the benefit of creditors, the court is justified in finding that attachment creditors have no valid lien upon the property attached, if they do not offer any evidence tending to prove debts due and owing from the defendant to the plaintiff in the attachment at the commencement of the suit.

INSOLVENCY — JUDGMENTS AS PREFERENCES. — Under the Assignment Act of Illinois, a judgment is not invalid as a preference when the only act which the insolvent did towards its procurement was to answer correctly questions put to him regarding his financial *status*. A creditor may, notwithstanding the statute, take steps to secure his debt as best he can, except that he must not be guilty of collusion with his debtor by which an unauthorized preference is sought to be made.

C. M. Hardy, for the appellants.

Kraus, Mayer, and Stein, for the appellees.

SHOPE, J. This is a contest between creditors of George Bohner & Co., an insolvent corporation of the city of Chicago, of which the appellee Caldwell was appointed assignee. The voluntary assignment of the corporation was consummated by the delivery of the deed of assignment, and placing the same of record, after the levy of an execution in favor of the Commercial National Bank, and of three writs of attachment in favor of the appellants, creditors, severally. When the assignee sought to reduce the assigned property to possession, he found the sheriff in custody under said execution and writs of attachment, who claimed the right to hold the same, subject only to the order of the court from which his writs were issued. This, in effect, left nothing upon which the deed of assignment could operate, except the residue after discharging these liens, if they were valid liens upon the property. If, however, they did not create valid liens, the assignee might, under the order and direction of the county court, institute proceedings, in the proper forum, for the recovery of the property included in the assignment: *Davis v. Chicago Dock Co.*, 129 Ill. 180. The county court, however, had no power or authority to interfere with the custody of the sheriff, acquired through the execution and attachments issued from the circuit court, except by consent of the several plaintiffs in said execution and attachments. It is familiar that where two or more courts have concurrent jurisdiction of the same subject-matter, the court first acquiring it by service of process will retain the same, to the exclusion of the other. Without consent, the county court had no jurisdiction over the property, for the reason that it had first been levied upon and attached by the process of the circuit court. A voluntary assignment by an insolvent debtor, after a valid levy of an execution or writ of attachment on all his personal property, and while the sheriff has the same in his custody, necessarily fails to confer jurisdiction over such property upon the county court; nor will that court have power to interfere with the execution of process of other courts of competent jurisdiction in respect of property not in the custody of the assignee, or within the administrative control of the county court. It has been repeatedly held that to invest that court with jurisdiction over property of the assignor, the assignee must reduce the property to his possession. When this is done, the property passes within the administrative control of the county court, and it will have ample power to determine and adjust any and all liens and claims, and all

conflicting rights or interests therein: *Preston v. Spaulding*, 120 Ill. 208; *Davis v. Chicago Dock Co.*, 129 Ill. 180. In such case, the possession of the assignee is that of the county court, and third persons claiming adversely must submit to the jurisdiction of that court.

Appellants deny the jurisdiction of the county court to pass judgment upon the validity of the liens created by the levy of their attachments. They insist that the circuit court alone had jurisdiction over the attached property, and could alone ascertain and declare their rights in respect of the same. This point might be conceded if the parties in interest had not, by consent, invested the assignee with the possession of the attached property, and thus clothed the county court with exclusive jurisdiction in respect thereof, and in respect of all claims thereon. The only defect in the jurisdiction of the county court was the want of possession by the assignee, and when that defect was supplied by the voluntary consent of appellants that the property should pass to the assignee, subject to their claims, the county court was clothed with full authority to settle all conflicting claims, including questions of priority that might arise in respect of such property. It was entirely competent for the parties to consent, as they did, to the order of the county court directing the sheriff to turn over possession of the property to the assignee. The rule giving exclusive jurisdiction to the court first acquiring it is one that the parties may waive; and, by consent, the jurisdiction of the circuit court was here waived, and the property passed into the hands of the assignee, to be disposed of under the direction of the county court, to all intents and purposes as if the assignee had acquired possession prior to the levy, but subject to the lien created by such writs. It is true that the consent of appellants for the transfer of possession from the sheriff to the assignee, who is trustee for all the creditors as well as for the debtor corporation, was upon the condition that such transfer should be subject to all priorities, liens, and rights that might have been acquired by the levy of said attachment. The right of all parties to the attached property was to remain *in statu quo*. If appellants, by their attachments, had acquired valid liens, such liens were to remain unaffected by the order on the sheriff to surrender possession to the assignee. This determined no right in the creditors, but left such right for future adjudication by the court having jurisdiction of the insolvent's property. If the bank appellee

had a prior lien by the levy of its execution, it was to continue a lien until the debt was paid. If, on the other hand, execution was obtained by fraud, or was preferential, then it would be set aside. And the same is true in respect of the attachments. These and all other questions, by the voluntary surrender of the property to the assignee, were submitted to the judgment of the county court. The result of this change of possession, and consequent change of jurisdiction, was not to deprive any of the parties of any legal right. Appellants might still have prosecuted their attachments to judgment in the circuit court, and thereby established the sums due them, and upon a showing to the county court that they would be entitled to judgment, that court would have been authorized to direct the assignee to retain sufficient of the funds in his hands to pay and satisfy whatever judgment might have been thus obtained, or might have determined the amount for which appellants had a valid lien, and by order upon the assignee compelled its payment in that court, and upon any question of fact arising, any of the parties might have had a trial by jury: *Hanchett v. Waterbury*, 115 Ill. 220.

On the hearing of the several petitions, and issues thereon, the county court found that the appellants had no valid lien on the property under or by virtue of the attachments. It necessarily followed that the county court must, in directing an assignee, pass upon and determine the question whether appellants had or had not a valid and prior lien upon the property. If appellants had such lien, as before seen, it was clearly the duty of the county court to protect it; if it had not, to so determine, and order the sale of the property without respect thereto. The burden of proof was upon the appellants asserting their liens, and the court could not give them priority over other simple contract creditors, without proof that they were entitled to such priority. They wholly failed to show that any debt was due and owing by the insolvent to them, or either of them, at the time of the issuance of the several attachments. Without a debt existed and was due, no action would lie. No formal pleading is required in making issues to be tried by the county court in such cases, and it devolved upon the appellants to show, at least, that they had a cause of action upon which judgment might be rendered in the attachment suits. No judgment could have been rendered, under the attachment suits, without a debt was due and owing from the defendant to the plaintiffs in the attachment, at the commence-

ment of said suits. We are not prepared to say that it was error in the county court to refuse to hold that appellants, by virtue of their writs and the levy thereunder, were entitled to a lien upon the property for any amount they might claim, without proof that there was some actual indebtedness due from the insolvent to the attaching creditors.

Appellants also object to the decree of the county court giving preference to the Commercial National Bank. They contend that the judgment and execution of the bank should have been adjudged void, as being a fraudulent preference within the assignment law. It appears that Eames, president of the bank, and Bohner, president of the insolvent corporation, had several interviews as to the prosperity and financial condition of the Bohner company. On learning that the business of the corporation had not been successful during the past season, Eames requested Bohner to furnish a list of the liabilities of the corporation, which he did on January 26, 1889, Bohner then admitting the inability of the corporation to meet its obligations. Eames sent for Smith, the attorney for the bank, and had a consultation with him. The attorney, unknown to Bohner, advised that judgment be taken on the notes of the corporation to the bank, without delay. These were judgment notes which had been executed at a prior date. Eames instructed Smith to procure judgment at once, but this determination and instruction were not communicated to Bohner. The latter informed the bank, through its president, that some of the creditors urged him to make an assignment under the statute, but gave no intimation, as it appears, that it was then intended that an assignment would be made. On the contrary, it appears he drew money to pay expenses of a trip East, to see his creditors, in the hope of making a composition or compromise. All Bohner did was to give truthful information as to the financial status of his company, in response to the legitimate inquiries of his creditors. No delay was made in preparing his assignment, or in delivering it, to enable the bank to acquire its lien. As before said, the judgment notes had been given some time before that date, and the bank might have taken judgment long before the interview spoken of.

Section 13 of the Assignment Act, which prohibits preferences among creditors, is directed toward insolvent debtors, and is intended to regulate and limit their course of conduct, after they have determined to yield the dominion and control of

their property for the benefit of creditors by making a general assignment. It has no application to the conduct of creditors, except in case of collusion with debtors, by which an unauthorized preference is sought to be made. The creditor may, notwithstanding the statute, take steps to secure his debt as best he can. The law does not deprive a creditor of the fruits of superior diligence in securing his indebtedness, so long as he does no act resulting in an unlawful preference by the debtor.

This proof fails to show any collusion between the bank or its officers and the insolvent corporation or its officers for the purpose of giving the bank any preference over its other creditors. The judgment obtained by the bank was the result of information derived by its president as to the financial condition of the corporation, which it was the duty of the debtor to give and the right of the creditor to require. It appears that Bohner had no notice or intimation that the bank was about to or would take judgment until about the time that it was entered up, or that he determined to make any assignment for the benefit of creditors until after the bank had determined upon its course, and had actually entered its judgment.

We are of opinion that the county court committed no error in holding that the bank had a valid lien under its execution. The judgment of the appellate court will be affirmed.

CREDITORS MUST PROVE THEIR DEBTS, in order to attack a sale on the ground of fraud: *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441; 40 Am. Dec. 198. A claim of a creditor who attaches a conveyance made by his debtor on the ground of fraud, in an action between him and the grantee, must be subject to examination, in order to see whether the creditor has a right, as such, to question the validity of the conveyance: *Miller v. Miller*, 23 Me. 22; 39 Am. Dec. 597.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. — PREFERENCES, VALIDITY OF: See extended notes to *Brown v. Brabb*, 11 Am. St. Rep. 561; *Crawford v. Taylor*, 26 Am. Dec. 584.

CONFLICTS OF JURISDICTION. — It frequently happens that two or more courts are competent to take jurisdiction over the same parties and the same subject-matter, or that process may issue from two or more courts authorizing the seizure of the same property, and that the action of either court, if it is allowed to proceed, may impair the jurisdiction of the other by taking property subject to its process, or determining some question of right which the other was, at least, equally competent to determine. In order to avoid conflict between tribunals of co-equal authority, the rule has been formulated, and so far as we know universally respected, that the court first acquiring jurisdiction shall be allowed to pursue it to the end, and that it will not per-

mit its jurisdiction to be impaired or subverted by a subsequent resort to some other tribunal.

If process issues from a court authorizing the seizure of property, and such seizure is made, it is thereby brought within the custody of the law, and a subsequent seizure of the property and taking it from the custody of the officer of the law by whom it was first seized will not be tolerated. Any subsequent levy must be in subordination to the first seizure. If any further levy is to be made, it must be by the same officer in whose custody the property is, and indeed the receipt by him of other writs operates as a constructive levy upon the property, subject to the claims under which the officer holds it: *Freeman on Executions*, secs. 135, 267; *Cresson v. Stout*, 17 Johns. 116; 8 Am. Dec. 373; *Leach v. Pine*, 41 Ill. 65; 89 Am. Dec. 375; *Wintle v. Chetwynd*, 7 Dowl. Pr. 554; 1 Will. W. & H. 581; *Townsend v. Corning*, 40 Ohio St. 335; *Keating v. Sprink*, 3 Ohio St. 105; 62 Am. Dec. 214; *Pulliam v. Osborne*, 17 How. 471; *Brown v. Clarke*, 4 How. 4; *Williams v. Benedict*, 8 How. 107; *Logan v. Lucas*, 59 Ill. 237; *Hagan v. Lucas*, 10 Pet. 400; *Schaller v. Wickersham*, 7 Cold. 376.

If property is seized by process issued by one of the state courts, a national court will not attempt to deprive the officer of its custody, nor will a state court undertake to dispossess an officer holding property under process issued by any of the national courts. In either event, if the custody of the officer is wrongful, redress, so far as possession of the property is involved, must be sought in the court whose officer has such possession: *Covell v. Heyman*, 111 U. S. 176; *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219, and note; *Fresman v. Howe*, 24 How. 450; *Chapin v. James*, 11 R. I. 86; 23 Am. Rep. 412; *Krippendorf v. Hyde*, 110 U. S. 276; *Brooks v. Montgomery*, 23 La. Ann. 450; *Lewis v. Buck*, 7 Minn. 104; 82 Am. Dec. 73. If, however, the seizure was wrongful, the party injured is at liberty to seek redress in any form of action which will not interfere with the possession of the officer. Hence, though replevin cannot be maintained against him for the possession of the property, damages may be recovered of him, if the taking was unauthorized, and an action for their recovery may be maintained in the state court, though the seizure of property was under a writ issued from one of the national courts: *Buck v. Colbath*, 7 Minn. 310; 82 Am. Dec. 91; 3 Wall. 343.

When an action is commenced in a court having jurisdiction over it, and the proper parties are brought before the court, it would seem to be clear that such court had the right to proceed to final judgment, and that this right cannot be destroyed by one of the parties subsequently resorting to another tribunal, and thereby transferring to it jurisdiction which had previously been vested elsewhere. So the authorities generally declare: *Hines v. Rawson*, 40 Ga. 356; 2 Am. Rep. 581; *Wilkinson v. Wait*, 44 Vt. 508; 8 Am. Rep. 391; *Merrill v. Lake*, 16 Ohio, 373; 47 Am. Dec. 377; and yet there are cases which constitute well-established exceptions to the rule, and which we are entirely unable to reconcile with it. If, after an action is commenced in one court, the plaintiff begins another action against the same parties for the same cause in other court, the pendency of the first action may generally be pleaded in abatement of the second. When such plea, if made, will be sustained is considered in the note to *Smith v. Lathrop*, 84 Am. Dec. 452-457.

One of the apparent exceptions to the rule that the court first acquiring jurisdiction must be permitted to exercise it to the end arises when a person suing in one state subsequently begins an action for the same matter and against the same parties in another state, or in one of the national courts, or

when, after first resorting to a national court, he subsequently institutes an action in a state court. In either case it is probably true that the court first acquiring jurisdiction must proceed to a final determination of the controversy, and yet it is at least equally true that the court last resorted to may also proceed. In other words, in no instance has the plea of another action pending for the same matter and between the same parties in another state been successful, nor will an action be abated in a state court on the ground of the pendency of the previous action in one of the national courts, or an action in one of the latter courts be abated by the pendency of an action in a state court: *Lowry v. Hall*, 2 Watts & S. 129; 37 Am. Dec. 495; *Stanton v. Embrey*, 93 U. S. 554; *Davis v. Morton*, 4 Bush, 442; 96 Am. Dec. 309; *Smith v. Lathrop*, 44 Pa. St. 326; 84 Am. Dec. 448; *Lockwood v. Nye*, 2 Swan, 515; 58 Am. Dec. 73; *Hatch v. Spofford*, 22 Conn. 485; 58 Am. Dec. 433; *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Allen v. Watt*, 69 Ill. 655; *Loring v. Marsh*, 2 Cliff. 322; *State v. Boyce*, 72 Md. 140; 20 Am. St. Rep. 458; *Beyersdorf v. Sump*, 39 Minn. 495; 12 Am. St. Rep. 678; *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678; *Phelps v. Winona etc. R. R. Co.*, 37 Minn. 485; 5 Am. St. Rep. 867.

While the court in which the second action is commenced may disregard the first action and its pendency, it is by no means certain that the court in which the action was first begun may not also disregard the second action, and that both may not proceed to final judgment, and therefore to what is, or at least ought to be, a final determination of the rights of the parties, and yet it is just as impossible for two tribunals to at the same time possess the power to make a final determination of the rights of the parties as it is for an irresistible force to come into contact with an immovable body. If there is an irresistible force, there can be no immovable body; and if there is an immovable body, there can be no irresistible force. The existence of either disproves that of the other. So in litigation, there cannot be two final decisions of the same question; for when one decision is final, no other can be. There may arise many cases, like the principal case, in which one of the litigants may preclude himself from insisting that the tribunal first acquiring jurisdiction shall proceed to final judgment, as when he voluntarily submitted the same question to another tribunal, as by bringing a second action on the same demand, and perhaps where, being a defendant, he fails to plead the pendency of the former action and proceeds without objection in a second suit to submit the controversy for a decision on the merits.

When the first and second actions are in the courts of different states, a plea in abatement, as we have seen, is unavailing in the second action, and certainly it cannot be possible that the commencement of the second action can abate the first, unless both parties acquiesce in it. If judgment is first obtained in the action last begun, may it be pleaded in bar of the first action, and the court having jurisdiction in that action in effect compelled to abdicate such jurisdiction by accepting as conclusive a decision of the latter suit? If neither judgment is pleaded in bar of the other, which must be awarded precedence? Perhaps each is conclusive in the state wherein it was entered; and if so, what effect shall be given them if they are brought into conflict in an action brought in a third state, or in a court of the United States? All these questions, so far as we are aware, have never been judicially answered.

If, after an action has been instituted in a court of the United States, one of the parties, without the assent or acquiescence of the other, undertakes to remove the controversy to a state court, we apprehend that no action of

the latter court can impair the right of the national court to proceed to judgment, and that if the state court should proceed to enter judgment, such judgment will be treated as void by the national courts, in so far as it may be interposed to prevent their further proceeding with the action, or to impair the force of any judgment they may render therein. We think no better discussion of the subject can be found than that contained in the following extracts from the opinion of Mr. Justice Field in the case of *Sharon v. Terry*, 13 Saw. 399: "Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon v. Hill*, we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him; and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states, — a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states: *Railway Co. v. Whitton*, 13 Wall. 270, 289. So valuable has the right of citizens of other states than the one in which the suits are brought against them to have their cases heard in a federal court always been regarded, that at the very outset of the government Congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court, he may, under proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court and tried or heard there; and all the acts of Congress have declared that it shall be the duty of the state court in such a case to accept the surety and proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. As said by the supreme court in *Railroad Co. v. Koontz*, 104 U. S. 14, it is well settled that 'when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored.' As Congress has made such careful provision to secure to citizens of other states a right to transfer to a federal court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant, properly summoned in the first instance into that court by a citizen of another state, could cut off and practically nullify the latter's constitutional right to a hearing there by instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible; it is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other. In *Wallace v. McConnell*, 13 Pet. 143, we have a decision of the supreme court of the United States illustrative and confirmatory of this doctrine. That case was brought in the district

court of the United States for the district of Alabama, exercising the powers of a circuit court, upon a promissory note of the defendant for \$4,840. The defendant pleaded payment and satisfaction, and issue being joined therein, the case was continued until the succeeding term. The defendant then interposed a plea of *puis darrein continuance*, alleging that as to \$4,204 of the sum demanded the plaintiff ought not further to maintain the action against him, because that sum had been attached in proceedings commenced against him under the attachment law of Alabama, in which he was summoned as garnishee. In those proceedings, he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case was ultimately taken to the supreme court, where it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount of the sum attached, and that therefore the demurrer ought to have been overruled. But the court said: 'The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of the courts, that would extremely embarrass the administration of justice.' In *Taylor v. Taintor*, 16 Wall. 370, the supreme court, speaking by Justice Swayne, said: 'Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function.' In *Shoemaker v. French*, Chase, 267, a bill was filed in the circuit court of the United States for the district of Virginia by the plaintiff, Shoemaker, for an injunction to prevent the defendant, French, from acting as president of the Alexandria and Washington Railroad Company, and an order was made directing that he be served with notice of motion for injunction. After this, French filed a bill in a state court of Virginia, praying an injunction against Shoemaker for matters cognate to the bill in the circuit court; and Chief Justice Chase, in granting the prayer of the bill in the circuit court, said: 'The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court.'

"The doctrine that where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the other, prevails very generally, both in the federal and state courts, with some exceptions, which we shall hereafter consider. Thus in *Gaylord v. Fort Wayne etc. R. R. Co.*, a bill was filed in the circuit court of the United States for the district of Indiana, to obtain, among other things, the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made, a receiver was appointed. Whilst proceedings were thus pending in the federal court, a suit was commenced

in a state court of Indiana, in which a receiver was also appointed, who took possession of the property. Subsequently, the parties thus having possession surrendered the property to the receiver of the federal court, upon his application and the presentation of its order. He was thereupon arrested by the state court, but the federal court released him, and he retained the property, the court refusing to rescind the order appointing him. In disposing of the case, the federal court said: 'We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the res, is entitled to retain it until the litigation is settled': 6 Biss. 286, 291. In *Union Mutual Life Ins. Co. v. Chicago University*, a bill was filed in a state court of Illinois to enjoin the foreclosure of a mortgage, and have it set aside and declared void. Later on the same day, a bill was filed in the circuit court of the United States for the northern district of Illinois to foreclose the mortgage. The process of the federal court was first served, preceding by a few hours the service of process from the state court; and it was held that the fact that process from the federal court was first served gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. In deciding the case, the court, speaking by Judge Drummond, said: 'It is undoubtedly a very embarrassing state of litigation, there being two suits, brought in two jurisdictions, involving, to a great extent, the same subject-matter, and I have felt some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage, and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago, — that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage': 10 Biss. 191, 195. In *Mason v. Pigott*, in the supreme court of Illinois, it appeared that the defendant, instead of making a defense in an action pending in a court of law, had attempted to transfer the case to a court of equity, and the court said: 'It by no means follows, because a court of equity has concurrent jurisdiction with a court of law, that it will take cognizance of a case already pending in a court of law and oust it of jurisdiction. As a general principle, in all cases of concurrent jurisdiction the tribunal which first obtains jurisdiction of the subject-matter must proceed and finally dispose of it. A court of equity will not take jurisdiction, where it has been first acquired by a court of law, unless there is some equitable circumstance in the case which the party cannot avail himself of at law. Subject to this qualification, the rule is inflexible': 11 Ill. 88. In *Bank of Bellows Falls v. Rutland etc. R. R. Co.*, in the supreme court of Vermont, it appeared that the defendant, in an action at law pending against him in Massachusetts, had filed his bill in a Vermont court of chancery to enjoin the action. The bill was dismissed, and the court, admitting the power of a court of equity to enjoin parties within its jurisdiction from proceeding in a court of law in another state, said: 'We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party having the

law in his favor from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts': 28 Vt. 470-477. In *Stearns v. Stearns*, in the supreme court of Massachusetts, a decree of the probate court appointing commissioners to make partition of an estate among the heirs was reversed, because proceedings were first commenced for that purpose in another court of concurrent jurisdiction against the parties moving the decree, which proceedings were pending when the decree was rendered, the court saying that 'when different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority *paramount* to the other courts; or rather, the action first commenced shall not be abated by an action commenced between the same parties in relation to the same subject in the same or any other court': 16 Mass. 170. The case of *Home Ins. Co. v. Howell*, in the court of chancery of New Jersey, presents some features similar to the case at bar. The complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois. The bill prayed that the policies might be delivered up and canceled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or equity upon them, or making use of them in any way for the purpose of establishing any claim or damage against the complainant. The defendant appeared and filed an answer, to which a replication being made, proofs were taken. After the suit was commenced, the defendant brought an action at law upon the policies against the company in a state court of Illinois, which suit was, on its petition, removed into the circuit court of the United States for the northern district of Illinois. The company thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting the suit in Illinois. An injunction having been issued, a motion was made to dissolve it. In denying the motion, the chancellor said: 'This court, having the power to hear and determine the subject-matter in controversy, and having *first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it.* The general rule is, that as between courts of concurrent and co-ordinate jurisdiction (and the circuit court of the United States and the state courts are such in certain controversies, such as that involved in this suit, for example, between citizens of different states), the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court. . . . Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and of course from prosecuting one commenced *after* the bringing of the suit in this court': 24 N. J. Eq. 239. In *Brooks v. Delaplaine*, the high court of chancery of Maryland dismissed a bill in equity because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction, the chancellor saying: 'When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. . . . Any other

rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results': 1 Md. Ch. 354.

"Similar decisions might be cited from the highest courts of nearly every state, for, upon the principle stated, there is, with certain well-recognized exceptions, a general concurrence of opinion. Where two judgments relating to the same subject are irreconcilable, both cannot be enforced. One or the other must give way; and the only reasonable test by which the superiority of one over the other is to be determined is that which is expressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment, independently of the commencement of the suit, were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident, or circumstances beyond the power of the court or parties, as one court may have a large calendar and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence, because it is enabled from paucity of cases to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference. The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found, on examination, to range themselves under two classes: 1. Where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations, or where the jurisdiction of a court of equity as well as of a court of law is invoked by him with reference to the matter. Of course a decision first rendered in either suit may be pleaded in the others, — the plaintiff must abide the adjudication which he has sought; and 2. Where the cases are upon contracts or obligations which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. The cases of *Duffy v. Lytle*, 5 Watts, 120, *Rogers v. Odell*, 39 N. H. 452, *Child v. Eureka Powder Works*, 45 N. H. 547, *Bank of United States v. Merchants' Bank*, 7 Gill, 415, and *Westcott v. Edmunds*, 68 Pa. St. 34, fall under one or the other of these classes. The language quoted from *Buck v. Colbath*, 3 Wall. 345, was used as explanatory of the general doctrine that in examining into the exclusive character of the jurisdiction of a court, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The illustration given, of a party suing in a court of chancery to foreclose his mortgage, and in a court of law to recover judgment on his notes, and in another court of law in an action of ejectment to recover the possession of the land, would have brought the supposed case, if a real one, under the first class of exceptions stated above, where a decree first rendered in either suit upon the same point could have been pleaded as conclusive in the others. In the *Tubal Cain* case, 9 Fed. Rep. 834, the judgment of the state court pleaded in the United States district court was recovered in the prior action, and the circuit court stayed its proceedings to await the determination of an appeal from the judgment. The other authorities cited do not seem to

us, after careful consideration, to be entitled to any weight upon the question presented. The case at bar is not within either of the excepted classes. The plaintiff has not invoked the jurisdiction of the state court; and the alleged marriage contract is not one which, in any sense of the rule, was merged, or could be merged, in the judgment, any more than a deed upon which the title to real estate is asserted is merged in a judgment in ejectment for the possession of the property. It was as much an outstanding and existing contract after the judgment of the state court as before, and was equally available for all purposes. But aside from this, the doctrine of the excepted cases can have no application to cases instituted in a federal court by a citizen of another state, so as to give paramount authority to a judgment of a state court in a suit subsequently commenced against him, without defeating a most important right conferred upon him by the constitution and laws of the United States, — a result which can in no manner be accomplished either directly or indirectly: See *Snydam v. Broadnax*, 14 Pet. 67; *Payne v. Hook*, 7 Wall. 430."

Although not stated in the opinion of Judge Field, the fact existed that the plaintiff, Sharon, when sued in the state court, did not plead the pendency of the prior action in the federal court, nor bring that action to the attention of the state court before it proceeded to a trial on the merits. Under these circumstances, it seems to us that he might properly have been held to have waived his right to return to the federal court and there seek another decision of the question which he had litigated on the merits in the state court. His mode of action gave him the chance of having a decision in his favor in the state court, without the risk of being prejudiced by the adverse judgment of that court.

Conceding, as we must, that if either a state or a national court acquires jurisdiction over a controversy and the parties thereto, it has the right to exercise such jurisdiction to final judgment, then it ought to follow logically, and in the promotion of a decent and orderly administration of justice, that if either litigant should subsequently attempt to transfer such jurisdiction to another court, that this attempt might be met and overcome by pleading in abatement the pendency of the prior suit. By no other means can a conflict of jurisdiction be avoided. It is idle for the tribunal last resorted to to proceed to final judgment in defiance of such plea, if such judgment when rendered leaves the court first acquiring jurisdiction at liberty to exercise it to the end, irrespective of the judgment first entered.

INDEPENDENT ORDER OF FORESTERS v. ZAK.

[186 ILLINOIS, 185.]

BENEFICIAL ASSOCIATIONS — GOOD STANDING. — The issuance of a certificate of endowment to a member is evidence of his good standing when it is issued, and such good standing will be presumed to continue, and the burden of establishing its loss must be assumed by the association.

BENEFIT ASSOCIATIONS — GOOD STANDING, LOSS OF, HOW MAY BE PROVED. — Where the rules of a benefit association declare what shall be deemed conduct unbecoming a member of it, and that upon trial and conviction thereof he may be reprimanded, suspended, or expelled, and a certificate

of endowment is issued to the member, stipulating for the payment of a specified sum to his wife upon his death, provided he shall remain in good standing at the time of such death, the payment of such certificate cannot be resisted on the ground that he was not in good standing, except by showing loss of such standing from the records, minutes, or proceedings of the order itself establishing such loss by the official action of the order.

CORPORATIONS. — THE ATTITUDE OF A CORPORATION TOWARDS ONE OF ITS MEMBERS can be known only by its action as a corporation, and the only admissible evidence of such action is the records of the proceedings of the corporation itself.

C. Stuart Beattie, for the appellant.

Jones and Lusk, for the appellee.

MAGRUDER, J. This is an action of *assumpsit* brought in the superior court of Cook County by the appellee against the appellant. Trial was had before the court and a jury, resulting in a verdict for the plaintiff, and after the overruling of a motion for new trial, in judgment upon the verdict. The appellate court has affirmed the judgment, and the case is brought before us by appeal.

The action is brought upon a certificate of endowment, dated December 28, 1883, executed by the appellant and issued to one Jan Zak, the deceased husband of appellee, who signed a written acceptance of the certificate, indorsed thereon. The material portion of the certificate is as follows: —

“This certificate is issued to Jan Zak, a member of Court Ceska-Lev No. 24, Independent Order of Foresters of Illinois, upon condition that the statements made by him in his application for membership in said court, and the statements certified by him to the medical examiner, be and they are hereby made a part of this contract, and upon condition that the said member complies in the future with the laws, rules, and regulations now governing the said order, or that may hereafter be enacted by the high court. These conditions being complied with, the said high court of the Independent Order of Foresters of Illinois hereby promises and binds itself to pay to Mrs. Anna Zak, his wife, in case of his death, as directed by his will, one thousand dollars, upon satisfactory evidence of the death of said member and upon the surrender of this certificate; provided, that said member is in good standing in this order at the time of his death; and provided also, that this certificate shall not have been surrendered by said member, and another certificate issued at his request, in accordance with the laws of this order.”

The previous application of Jan Zak for membership in Court Ceska-Lev contained, among other things, the following agreement: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order now in force, or which may hereafter be adopted by the same."

Jan Zak died intestate on April 23, 1887. Proceedings were taken for his expulsion during his lifetime, but it is conceded that the attempted expulsion was absolutely void for want of proper notice. The charges made against him, upon which the proceedings in question were based, were: 1. That he appropriated to his own use certain moneys put into his hands by a brother member to be used for the purpose of paying the dues of the latter; 2. That he had sustained improper relations with another man's wife.

Upon the trial, the defendant, for the purpose of showing that the deceased was not "in good standing" in the order at the time of his death, offered to prove, by the oral evidence of certain witnesses, that the foregoing charges were in fact true, and also that the deceased had failed to pay his lawful dues to the "court" during the last year of his life. The trial judge refused to admit the proof, and the defendant excepted. The rejection of this evidence is assigned as error. We are of the opinion that it was properly rejected.

The subject presented for our consideration is the meaning of the expression "in good standing." The promise to pay, as set out in the certificate, is subject to the proviso that "said member is in good standing in this order at the time of his death." In *Royal Templars of Temperance v. Curd*, 111 Ill. 284, we held that the application and the certificate constituted the two parts of a contract, the first being obligatory upon the beneficiary, and the second upon the order. It was also there held that the words "good standing" were to be construed with reference to the language of the application and the language of the certificate. Adopting this method of ascertaining the meaning of the words, it may be said, for the purposes of the present case, that a member is "in good standing" when he complies with the laws, rules, usages, and regulations of the order. Inasmuch as the rules of the appellant prescribe the mode of paying dues and assessments, and the penalties for their non-payment, compliance with the laws, rules, usages, and regulations of the order necessarily includes

punctual payment of all dues and assessments for which a member may become liable.

The issuance of the certificate to a member is evidence of his good standing when it is issued, and such good standing will be presumed to continue, unless there is proof that it no longer exists. In view of this presumption, the burden of proving the loss of good standing rests upon the society: Bacon on Benefit Societies, sec. 414. It was therefore proper for the order to show by legitimate proof that the deceased had failed to pay his lawful dues during the last year of his life. Such failure, if without valid excuse on his part, and without fault on the part of the order, would have been competent evidence of the loss of good standing.

In the case at bar, however, something more is involved in the meaning of "good standing" than the non-payment of dues at the times and in the mode specified in the rules. It was held in the Curd case that "good standing" meant "good conduct"; that is, freedom from the violation of those requirements which indicate the benevolent purposes of the society, or express its intention to insist upon a high standard of character among its members. Section 1 of article 13 of the constitution of appellant specifies and defines what is "conduct unbecoming a Forester." If, therefore, a member has been guilty of unbecoming conduct as thus defined in the constitution, proper and legitimate evidence of such conduct would be competent as bearing upon the question of his standing in the order. Section 1 of article 13 contains the following clause: "Any member of this court who shall violate any of the laws, rules, or regulations of the order, the constitution, by-laws, or rules of this court, or any lawful order made in relation to any of the aforesaid laws, rules, or regulations, or who shall commit any act tending to injure the good name of the order, impair its efficiency, or bring it into disrepute, shall be deemed to be guilty of conduct unbecoming a Forester." In view of the language of this clause, it cannot be said that a member would be in good standing in the order if he had committed an act which tended to injure its good name, or impair its efficiency, or bring it into disrepute. We are not prepared to say that such an act was not committed by the deceased, if he had been guilty of either of the charges upon which an attempt was made to expel him.

But the defendant below did not show, or offer to show, the loss of good standing by the right kind of proof. Immediately

following the clause above quoted from section 1 of article 13 is this clause: "And upon due trial and conviction thereof, shall be reprimanded, suspended, dropped, or expelled, as the court or other lawful authority may determine." Whether the offense be a violation of the rules, or an indulgence in conduct unbecoming a member of the order, there must be a trial and conviction, before even a reprimand can be inflicted. It was therefore necessary to show the loss of good standing by the minutes, proceedings, or records of the order itself, and not by the oral statements of officers or members. If these societies were allowed to prove, after a member's death, that he had committed certain unworthy acts, and that those acts were known to the other members, and that thereby his good standing had been ended, the temptation to avoid or contest the payment of death losses would oftentimes be too great to be resisted.

Under such a constitution as that of appellant, the loss of good standing must be shown by some official action on the part of the organization. The words of the certificate are: "Provided the said member is in good standing in the order." The order is a corporate body. The attitude of a corporate body towards one of its members can only be known through its action as such corporate body. The only proper evidence of such action will be the records or proceedings of the organization itself. Section 2 of said article 13 contains a proviso that "for non-payment of dues, assessments, or fines, a member may be dropped from membership without the formality of a trial as above set forth." It still remains true, however, that the act of "dropping" a member is the act of the corporate body, and such act can be proven only by the official proceedings of such body. In *Medical etc. Soc. of Montgomery Co. v. Weatherly*, 75 Ala. 248, the supreme court of Alabama, speaking of the power to terminate a membership for non-payment of dues, or other cause, says: "The rule of law is known to be that this power resides generally in the body of every corporate society, that it is judicial in its nature, and must be exercised by a vote of the society expressing the corporate will, and ordinarily the records or minutes of the body must show that the requisite steps were taken in compliance with the charter and by-laws of the corporation, after reasonable notice to the party charged, either express or implied."

The Curd case, already referred to, is distinguishable from the case at bar, because in that case the beneficiary, in his

application for membership, not only agreed that compliance with the laws and regulations of the society should be necessary to entitle him to participate in the fund, but, in addition thereto, also agreed that violation of his pledge of total abstinence, or suspension or expulsion for a violation of any of the laws, should operate as a forfeiture of his right to the fund, and because the certificate in the Curd case recited that it was issued to the beneficiary upon the express condition that he should faithfully maintain his pledge of total abstinence and comply with all the laws, rules, and regulations. As the maintenance of the pledge of total abstinence was thus made a special condition in the contract, the violation of such pledge was held to be a forfeiture of the right of recovery without trial and conviction.

The judgment of the appellate court is affirmed.

BENEFICIAL ASSOCIATIONS — RIGHTS OF MEMBERS. — A certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of its officers. If he has performed his part of the contract, and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow his claim will not defeat a recovery: *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196, and note. For a discussion of the subject of mutual benefit societies, see extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 781. For a case in which it was held that an entry in the records of a lodge was not conclusive evidence of expulsion therefrom, see *Supreme Lodge v. Wicks*, 72 Tex. 257.

CHAMPLIN v. CHAMPLIN.

[186 ILLINOIS, 309.]

WILLS — CONFLICT OF EVIDENCE. — Where, upon an issue respecting the mental capacity of a testator to execute his will, there is a conflict of evidence, the appellate court will not disregard a finding of the jury, unless it is clearly against the weight of evidence.

STATUTE OF FRAUDS — TRUSTS. — WHEN A CONVEYANCE IS ABSOLUTE IN FORM, the grantor is not permitted by parol evidence to prove that the conveyance was in trust to hold the property for himself and others.

STATUTE OF FRAUDS — TRUSTS. — If a grantee of property devises it to different persons, to be held in different proportions, without referring to any obligation to so dispose of it, such devise, aided by parol evidence, cannot establish a trust in favor of the devisees pursuant to an alleged parol agreement, entered into before the land was conveyed to the testator, between him and his grantor, that the land conveyed should be held by the grantee during his life, and after his death should be divided among

the grantees and others, who are the same persons named as devisees in such will.

TRUSTS, RESULTING.—If real property is purchased and a conveyance is taken in the name of one person, while the purchase-money is paid by another, a resulting trust arises from the transaction in favor of the person thus paying the purchase price. A trust of this character does not depend upon contract and is not affected by the statute of frauds.

H. H. McDowell and G. W. Patton, for the appellants.

McIlhuff and Torrance, for the appellees.

CRAIG, J. This was a bill in equity, brought by Alsom P. Champlin and Henry C. Champlin, to set aside a will, and the probate thereof, of Tirzah Champlin, the mother of complainants, on the ground that the testatrix was incompetent to make a will at the time the alleged will was executed. It is also charged in the bill that the lands devised were held by the testatrix, not in her own right, but in trust for the complainants and others, and hence she had no power to devise the same by will or convey by deed. The complainants in the bill prayed that the instrument of writing purporting to be the last will and testament of Tirzah Champlin, deceased, and the probate thereof, be set aside as null and void; that the instrument in writing made and executed by her, and bearing date March 15, 1881, be declared her last will and testament, and the said estate distributed in accordance therewith, and that the said deeds of date March 2, 1887, be declared null and void, and that the same may be set aside, and that such other and further relief might be awarded as equity might require, etc.

The defendants put in an answer to the bill, in which all material allegations relied upon for relief were denied, and upon the filing of a replication, an issue was made up for a jury whether the paper writing produced was the last will and testament of Tirzah Champlin, deceased. The issue thus formed was submitted to a jury, and after hearing the evidence, the jury found that the testatrix, at the time she executed the paper writing, was mentally competent to execute the same, and that the paper writing was her last will and testament. Upon the other question,—whether Tirzah Champlin held the lands devised by the will in trust,—the cause was referred to the master in chancery, to take and report the evidence to the court. After the evidence was taken, a hearing was had, and a decree rendered in favor of the defendants.

It is first insisted that the verdict of the jury on the question

of testamentary capacity of the testatrix is contrary to the weight of evidence, and upon that ground the decree should be reversed. On the trial much evidence was introduced tending to show a want of mental capacity to execute a will. On the other hand, evidence was introduced tending to show that the testatrix, at the time she executed the will, was capable of transacting ordinary business, and hence possessed the necessary mental capacity to dispose of her property by will. As often occurs in such cases, there was much conflict in the evidence. We have given the evidence a careful consideration, and while much of it tends to sustain contestants' view, we are not prepared to say that there is such a preponderance in favor of contestants as would authorize us, on appeal, to disturb the finding of the jury. This court has held, in many cases, that when the evidence is conflicting, the verdict of the jury will not be disturbed, unless it is clearly against the weight of evidence.

It is also claimed that Tirzah Champlin held the two tracts of land in trust, and had no right to dispose of them by deed or will, as she attempted to do by deed of March 2, 1887, and will of June 24, 1887. The lands involved consisted of two tracts,—the northeast quarter of section 29, township 27 north, range 6 east, of the third principal meridian, and sixty-three acres adjoining the quarter-section, known as the "Beedler tract." It appears from the evidence that the quarter-section was purchased by Lewis C. Champlin, in 1861, of W. G. McDowell. He bought the land on credit, and received a bond for a deed. In September, 1862, he enlisted in the army, and turned over his contract to the complainants, Alsom P. and Henry C. Champlin, who assumed the payments, took possession of and improved the land. On the 31st of December, 1866, complainants had accumulated two thousand dollars, and borrowed two thousand dollars more, which they paid to McDowell, and he executed and delivered to Alsom P. Champlin a deed for the premises. The complainants, together with their father and mother and three sisters, from the time of the purchase, resided upon the premises, the complainants having the entire management of the farm and all business connected therewith. Alsom P. Champlin had remained unmarried until 1876, when he notified the family that he expected soon to be married. This announcement created discord in the family, the sisters insisting that they had assisted to earn the land, and the marriage of complain-

ant, without some arrangement, might deprive them of their rights. It was finally agreed that Alsom P. Champlin should convey the quarter-section of land to his mother, Tirzah Champlin, and she should hold it until her death, when it should be equally divided between the two complainants and their three sisters. Under this arrangement Alsom P. Champlin, on August 4, 1876, for the expressed consideration of one dollar, conveyed the land to his mother.

The deed executed by Champlin to his mother is an absolute, unconditional deed. It contained nothing indicating that the land was conveyed in trust. Indeed, the only evidence introduced to prove the trust was the declarations of Tirzah Champlin, to the effect that she did not own the land; that she could not sell it; that it belonged to the children, and they would get it after her death. Section 9 of chapter 59 of our statute of frauds and perjuries (Rev. Stats. 1874, p. 541) provides: "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by last will in writing, or else they shall be utterly void and of no effect; provided, that resulting trusts, or trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol."

It is not claimed that the transaction established a resulting trust, or a trust created by construction, implication, or operation of law. It will be observed that the deed contained no recital that the land was conveyed in trust, and there was no writing of any description showing or tending to show that the land was conveyed in trust or held as trust property, and under the statute, the agreement relied upon, tending to establish a trust, was void: *Lantry v. Lantry*, 51 Ill. 458; 2 Am. Rep. 310; *Scott v. Harris*, 113 Ill. 447. It, however, appears that in 1881 Tirzah Champlin executed a will, in which she devised the lands to complainants and their three sisters, so that at her death they would take the lands share and share alike, as she had verbally agreed they should have the lands when they were conveyed to her, and it is argued that the execution of the will is a sufficient writing to take the transaction out of the operation of the statute of frauds. Had the paper executed as a will contained a declaration or statement, over the signature of Tirzah Champlin, that she held the lands in trust, the trust might be enforced. But the will con-

tains no declaration or statement of that character. On the other hand, by the will she disposed of the property as an absolute owner.

So far, therefore, as the quarter-section of land is concerned, we think the decision of the court, holding that no trust was established, was correct; but as to the other tract, — the sixty-three acres known as the "Beedler tract," — it rests upon a different principle. The evidence shows that this land was purchased, in 1876, by A. P. and Henry Champlin, and paid for by them, but the deed was made from Beedler (who sold to the Champlins) to Tirzah Champlin. She paid no part of the purchase-money, was not present when the deed was executed, and so far as appears, had nothing to do with the purchase of the land. As a general rule, where real property is purchased, and a conveyance of the legal title is taken in the name of one person, while the purchase-money is paid by another, a resulting trust immediately arises from the transaction, and the person to whom the conveyance is made will hold the property in trust for the party who furnished the purchase-money which paid for the property: *Perry on Trusts*, sec. 126. A trust of this character does not depend upon a contract, or arise from an agreement, nor is it affected by the statute of frauds; but, on the other hand, a resulting trust is one arising by operation of law, where an estate has been purchased in the name of one, and the consideration came from another: *Lloyd v. Spillet*, 2 Atk. 150. Under the law as to resulting trusts, we think it is clear that Tirzah Champlin never owned the sixty-three-acre tract purchased of Beedler, and she had no right to sell it, or devise it by will. As to this tract of land, we are of opinion the decree was erroneous.

Several other questions have been discussed in the brief of counsel for appellants, but a part of them do not arise on the record, and the others are not of sufficient importance to merit a discussion.

For the error indicated, the decree will be reversed, and the cause remanded, with leave to amend the bill to conform to the evidence in respect to a resulting trust, or otherwise, and to make new parties, if counsel deem it advisable to do so, with leave also for each party to introduce additional evidence.

TRUSTS — STATUTE OF FRAUDS. — A deed absolute cannot, by parol evidence, be shown to have been given in trust for the benefit of the grantor, in the absence of fraud, accident, mistake, or a fiduciary relation between the

parties: *Peeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836, and note; *Gowdy v. Gordon*, 122 Ind. 533. Parol evidence is admissible to show that a conveyance absolute on its face was made upon trusts, or that it was made to hinder, delay, or defraud creditors: *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812. Parol evidence is admissible to show that land conveyed to a grantee, by a deed absolute on its face, is in fact held in trust for charitable uses, but such evidence must be clear, strong, and convincing: *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562, and note. The statute of frauds does not extend to trusts arising by operation of law: *Ward v. Ward*, 59 Conn. 188.

TRUSTS, RESULTING, ARISE WHEN. — A resulting trust arises in favor of a wife when a husband agrees to treat his wife's money as her separate estate, and invests it in land for her benefit, taking the title in his own name: *Beam v. Bridgers*, 108 N. C. 276; 23 Am. St. Rep. 59, and note; *Mosteller v. Mosteller*, 40 Kan. 658; *Kinlow v. Kinlow*, 72 Tex. 639. When one buys land with the money of another, and takes the legal title in his own name, a resulting trust arises in favor of the former: *Beck v. Uhrich*, 13 Pa. St. 636; 53 Am. Dec. 507, and note; *Peck v. Peck*, 77 Cal. 106; 11 Am. St. Rep. 244, and note; *Taylor v. Miles*, 19 Or. 550; *Ramage v. Ramage*, 27 S. C. 39; *Marcilliat v. Marcilliat*, 125 Ind. 472; *Parker v. Newett*, 18 Or. 274; *Ward v. Ward*, 59 Conn. 188; *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498, and note. See extended note to *Neill v. Keese*, 61 Am. Dec. 751, for a discussion of this subject. No trust results where a person pays for land with his own money: *Lamar v. Wright*, 31 S. C. 60; *Watson v. Young*, 30 S. C. 144. A resulting trust, it seems, will not arise in favor of an alien: *Zundell v. Gess*, 73 Tex. 144. When a party pays money for another, in whom was previously the legal title, no trust results: *Booser v. Teague*, 27 S. C. 348.

CARNEY v. MARSEILLES.

[136 ILLINOIS, 401.]

STREETS AND HIGHWAYS. — A MUNICIPAL CORPORATION CANNOT ESCAPE LIABILITY to a person injured by the want of repair of a bridge, on the ground that it was unable, for want of funds, to place such bridge in repair, if, instead of closing the bridge, it keeps it open for travel as a part of one of its public highways.

JUDGMENT. — EQUITY WILL NOT ENJOIN THE COLLECTION of a judgment on the ground that the applicant for relief had a defense to the action at law which he failed to plead, in the absence of fraud or mistake of fact by which he was prevented from interposing it.

JUDGMENT AGAINST A MUNICIPAL CORPORATION will not be enjoined in equity at the instance of a tax-payer on the ground that the municipality had a good defense to the original action, in the absence of allegations showing that the judgment was the result of fraud or of collusion between the judgment creditor and the municipality or its officers.

CONFLICT OF LAWS. — WHEN, AFTER A LIABILITY ACCRUES AGAINST A MUNICIPAL CORPORATION, its capacity to levy taxes is increased by its reorganization under a general corporation act, the amount which may be applied to the satisfaction of the judgment is not limited to the taxing capacity of the municipality when the liability arose.

Bird Bickford and P. McArthur, for the plaintiffs in error.

Brewer and Strawn, for the defendants in error.

SHOPE, J. This was a bill in chancery, by Charles Carney and others, tax-payers of the village of Marseilles, in La Salle County, against said village and George Howland, to enjoin the payment of a judgment obtained by Howland against the village, and from the imposition and collection of taxes upon the property of complainants for the payment of that judgment.

The bill alleges that on May 3, 1886, Howland recovered judgment against the village, in the La Salle circuit court, for the sum of five thousand five hundred dollars for personal injuries resulting from the failure of the village to keep and maintain in suitable repair a certain bridge within said village, and which, on appeal, was affirmed. It is further alleged, that thereupon, on demand of Howland, the village authorities appropriated of the funds of the village the sum of \$1,000, and, by ordinance, levied for the year 1888 the sum of \$4,475, included in which was the sum of \$1,000 to be paid on said judgment. It was also alleged, on information and belief, that nearly all of the said tax had been collected, and the greater portion thereof paid into the village treasury, and that the village would, unless restrained, pay said one thousand dollars to Howland on his judgment.

The bill sets up two principal grounds for the equitable relief sought: 1. That the village had a good defense to the suit of Howland, in which said judgment was obtained, which was not interposed by the village, and that complainants, tax-payers, are not responsible for the negligence of the village authorities in that regard; and 2. That the tax levied is illegal, it being in excess of the amount authorized by law to be assessed by the village, and being illegally levied, no portion of it can lawfully be paid upon said judgment. These are the principal points made, and will be considered in their order.

It is alleged that the village had no funds, and was unable, within the limitation upon its powers of taxation, to procure the means necessary to keep and maintain the bridge in safe repair, and it is insisted that the village was therefore relieved of all responsibility for the injury caused by its being out of repair. If this question could be raised in this way and by these complainants, upon the facts alleged, they were not entitled to the relief sought, nor could that defense, if interposed, have availed the village. The bill alleges that the bridge in

question spanned the Illinois River, and was situated at the south end of Main Street, in said village; that said street and bridge made a continuous public highway through said village and across said river, and "the same is, and has been for many years, and was at the time of the accident" to Howland, the only avenue for public travel between the north and south sides of said river, between Ottawa and Seneca, a distance of fifteen miles. The injury to Howland, which formed the basis of recovery of the judgment, occurred in 1883, and it is shown, by clear implication at least, that after 1878 the bridge was a free bridge within the village, connected with its streets, and forming therewith a highway open and traveled by the public in entering and departing from the village, and that it was the only avenue for public travel from or in going to points on the south side of the river. It is also alleged, in effect, that from 1878 the bridge "was in a dilapidated, rotten, dangerous, and unsafe condition, both in its substructure and superstructure," and so continued to the time of the injury.

By the special charter under which the village was incorporated and acting at the time of the injury, as well as under the general city and village act, which it subsequently adopted, the village was given absolute control of the streets, bridges, etc., within its limits. Of this power, and the resulting duty to keep its streets and bridges in reasonable repair, so that the public might pass over them in safety, the village could not divest itself: *Kreigh v. Chicago*, 86 Ill. 407. The bill, except its allegations in respect of the illegality of the present tax, is based upon the principle that the village was not responsible for the non-repairing of the bridge, because of its inability, under the limitations on its power of taxation, to raise funds with which to repair the same, and admits, by implication, the duty to repair, except for that reason. By fair intendment, from the allegations of the bill, it must be regarded as conceded that this bridge, within the limits of the village, connected with one of its streets, and under its control, had been for practically five years before, and at the time of the injury was, in a dilapidated, rotten, and unsafe condition, and during that time was kept open for travel, and was traveled by the public as the only thoroughfare for crossing to or from the south side of the river.

While a municipal corporation cannot be required to make improvements or repairs the cost of which will be in excess of its corporate power to raise money for such purposes, yet, hav-

ing exclusive control, it is required by law to maintain its bridges kept open for the use of the public in reasonably safe condition and repair; and if, for any reason, as that the cost of repair will be more than the fund at the disposal of the municipality, or which it might, by the exercise of its corporate powers, command, the repair is impossible, the street or bridge, if known to be unsafe, should not be held out to the public as safe for its use. The duty of the corporate authorities would be to close the bridge against the public, and warn them of the danger of passage over it until put in proper repair. The public have no means, other than appears on the surface, of determining the safety of the bridges forming part of public thoroughfares, and may rely, as common experience shows they do, upon a reasonable discharge of the duty by the municipality. Any one finding a bridge, connected with and forming part of one of the streets of the village, open for use, and traveled by the general public, would, in the absence of anything to apprise him of danger, drive upon it, relying upon its safety, and would be justified in so doing. We said in the principal case when before us (*Marseilles v. Howland*, 124 Ill. 547): "We are willing to concede that the village was not bound to maintain the bridge as a part of the public highway unless it saw proper to do so. It had the power to condemn the bridge as a nuisance, and close it up." The principal question there was as to the acceptance of the bridge by the village, and it was held to have accepted it, and was responsible for failure to suitably maintain the same. If there was lack of funds with which to repair, and the bridge was unsafe, the village authorities knew it, or were chargeable with knowledge thereof, while presumably neither Howland nor the public had any notice of either fact; and, clothed with ample power to condemn and close the bridge if unable to repair, and thus have prevented the injury, the village, according to this bill, for five years permitted this constant menace to the persons and property of all who accepted the invitation tendered by its acts to remain open for the public use, without warning or notice of the danger, and it could not be heard, in a suit for damages resulting from its want of discharge of duty, to say that it had no funds with which to repair. Every municipality is required to keep all bridges, etc., within its corporate limits, which it holds out to the public as safe for its use, in reasonable repair and condition.

Independently of this, however, this bill seeks to relitigate

the liability of the village to Howland for the injuries sustained by him through its alleged negligence in failing to keep said bridge in repair. It is manifest the question of the liability of the village was settled and finally determined in the suit at law, and cannot, as we think, be reopened and relitigated in this forum, except for fraud, accident, or mistake in the rendition of judgment in that action. A court of equity will not enjoin the collection of a judgment on the ground that the party seeking relief had a defense to the action at law, which he failed to plead, in the absence of fraud or mistake of fact by which he was prevented from interposing it: *High on Injunctions*, secs. 165-169; *Lucas v. Spencer*, 27 Ill. 15; *Albro v. Dayton*, 28 Ill. 325; *Ramsey v. Perley*, 34 Ill. 504; *Smith v. Powell*, 50 Ill. 21; *Allen v. Smith*, 72 Ill. 331; *Clark v. Ewing*, 93 Ill. 572. Courts of equity will enjoin the misapplication of public funds to an unauthorized use: *Colton v. Hanchett*, 13 Ill. 615; *Livingston Co. v. Weider*, 64 Ill. 427; *Davis v. Wilson*, 65 Ill. 525. But where the liability of the municipality, which represents the people and tax-payers within its limits in respect of municipal concerns, has been determined in a court of competent jurisdiction, in the absence of fraud such liability cannot be relitigated in a court of equity at the suit of a tax-payer. The judgment, the payment of which is sought to be enjoined, is not void, even if a legal defense existed which the village failed to interpose. There is no allegation of the want of jurisdiction in the court rendering the judgment, and if it had been rendered without any defense at all, it would, in the absence of fraud, be conclusive as to the liability of the village. There is here no allegation or pretense that the judgment was the result of collusion between the village and Howland, or that any fraud was practiced upon the village or the court rendering said judgment.

The charter under which the village was organized and acting at the time of the injury limited the power of taxation for municipal purposes to one half of one per cent of the assessed value of property within the village. Subsequent to the injury, and before the levy of 1888, collection of which is sought to be enjoined, the village reorganized under the general incorporation act of 1872, which authorizes a levy of not to exceed two per cent on all taxable property of the village. The levy was two per cent, and it is contended that as the limit of taxation was one half of one per cent when the damages accrued, a levy of two per cent cannot be made and any

part of it used to pay said judgment; that all Howland can be entitled to is the excess of taxes, etc., levied at one half of one per cent, after the current expenses of the village are paid. By the change in the organization of the village, its liability for damages or other indebtedness was in no way altered or released: Rev. Stats., art. 1, c. 24, sec. 12. After the change of organization, suits, although for liabilities existing prior thereto, would progress to final judgment precisely as if no change had been effected. The judgment, when obtained, fixed the liability of the village and determined the amount of the debt to be paid from its revenues, and it is wholly immaterial, in this respect, whether the cause of action accrued or the judgment was rendered before or after the reorganization. The corporate liability became thereby determined, to be paid from the funds and revenues of the village. The revenue derived by taxation must necessarily be levied and collected under and by virtue of the power conferred by the law in force in the village at the time of its levy and collection. By adopting the general incorporation act, the liability of the village was not changed, — it still remained, as before, a legitimate corporate purpose to pay and discharge corporate indebtedness, but thereby the village became invested with the additional power of taxation therein provided. When collected, the taxes became corporate funds, to be paid out as directed by the proper village authority, for any legitimate corporate purpose.

No tax-payer can have a vested interest in the limitation upon the corporate taxing power: Cooley's Constitutional Limitations, 284. Municipal corporations are creatures of the legislative will, and, generally speaking, are subject to its absolute control. There may be, and are, exceptions to this broad rule, but they arise only when necessary to protect some private right.

We are of opinion that the bill was properly dismissed, and the decree so ordering will be affirmed.

MUNICIPAL CORPORATIONS — DEFECTS IN STREETS — LACK OF FUNDS TO REPAIR. — It is no defense to an action against a city for injury, caused by permitting its streets to remain out of repair, that it had no funds on hand to expend for repairing them, when the charter permitted it, with the consent of a majority of its inhabitants, to levy a larger tax for purposes of general utility: *Erie v. Schwingler*, 22 Pa. St. 384; 60 Am. Dec. 87, and note; *Mayor v. Lewis*, 92 Ala. 352; and in such an action it is no defense to show that the corporate funds had been exhausted in other necessary repairs, if the cost of repairing

the place where the injury occurred could have been charged on the adjoining property: *Shelby v. Clagett*, 46 Ohio St. 549. The rule that a want of funds, and an absence of power to raise money or to enforce contributions of labor from its citizens, will free a municipality from liability for defects in its highways does not apply when the city charter gives extensive power of taxation for the purpose of improving its streets and avenues: *Whitfield v. Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596, and note. If a city, by its charter, is charged with the duty of keeping its streets in repair, and has ample means provided by taxation for such purpose, it will be liable for neglect to perform this duty: *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345, and extended note.

INJUNCTIONS TO RESTRAIN JUDGMENTS. — A judgment will not be enjoined, unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered: *Hartford etc. Ins. Co. v. Meyer*, 30 Neb. 135; 27 Am. St. Rep. 384, and note.

CONFLICT OF LAWS. — The amendment of a city charter by prescribing a different mode of making street improvements cannot be construed as repealing the old section as to existing contracts: *Flewelling v. Proetzel*, 80 Tex. 191.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. QUINCY.

[186 ILLINOIS, 563.]

STREET ASSESSMENTS. — AN ORDINANCE SPECIFYING THAT A STREET IS TO BE PAVED TO THE WIDTH OF THIRTY-SIX FEET sufficiently specifies the portion to be paved, when the whole street is sixty-six feet wide, and the parts actually taken up by sidewalks occupy thirty feet.

STREET ASSESSMENTS. — LANDS MUST BE REGARDED AS ADJACENT TO A STREET improvement when separated therefrom by sidewalks only.

MUNICIPAL CORPORATIONS. — THE POWER TO IMPROVE STREETS, like other legislative powers, is a continuing one, and the municipal authorities are the exclusive judges of the necessity and propriety of its exercise.

MUNICIPAL CORPORATIONS — STREETS — ABDICATION OF CONTROL OVER. — A municipal corporation has no power to grant any consent, or make any contract, or adopt any ordinance the effect of which would be to relinquish control over its streets, or to abandon its duty to keep them in repair, and any grant conferring upon a railroad corporation the right to use such streets must be held in subordination to the right and duty of the municipality to improve and keep them in repair.

MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF RAILROADS THEREIN. — The right given to a railroad corporation by a municipality to lay down and use tracks in one of its streets is subject to the general right of the public to use the same street. The privilege conferred upon the corporation is not exclusive, but must be shared in common with the general public.

MUNICIPAL CORPORATION — STREETS, CONTROL OVER. — The streets are held in trust for the public use, and are public for all purposes of free and

unobstructed passage. For those purposes a city may improve and control them and adopt all needful rules and regulations for their management and use, but cannot alienate or otherwise dispose of them.

MUNICIPAL CORPORATION — RIGHT TO PAVE STREETS OCCUPIED BY A RAILWAY. — Though a portion of a street is occupied by the tracks of a railway corporation under a grant from the municipality conferring such right, the city council has a right to take measures for paving the street, notwithstanding the fact that the railway has its tracks therein, and is using them from day to day, and the business of the corporation may suffer serious interruption during such paving.

J. F. Carrott and O. F. Price, for the appellant.

W. G. Feigenspan, city attorney, and J. Sibley, for the appellee.

MAGRUDER, J. On June 19, 1889, the city council of the city of Quincy adopted an ordinance for the paving of Front Street between Broadway and Hampshire streets, providing therein that the cost should be paid by special taxation upon the real estate contiguous to the improvement. The commissioners named in the ordinance made an estimate of the cost; their report of such estimate was approved by the city council; an order was entered by the council directing the city attorney to file a petition in the county court for the assessment of the cost of the improvement in accordance with article 19 of the "Act to provide for the incorporation of cities and villages"; on December 27, 1889, the city, by its attorney, filed its petition in the county court of Adams County for the levying and assessing of the special tax for the cost of the improvement provided for in the ordinance; the county court appointed commissioners to assess and levy a special tax upon the real estate contiguous to and abutting upon the portion of Front Street above mentioned; the commissioners filed their report or assessment roll, to which the appellant company, as owner of 650 feet of ground west of Front Street and assessed for \$3,490.50, filed objections; these objections were overruled, and the assessment roll was confirmed. From such judgment of the county court confirming the report of the commissioners this appeal is prosecuted.

The appellant filed six objections, of which the first, third, and fourth may be considered together. The first is, that the ordinance is illegal, invalid, and void. The third is, that the ordinance, which provides for the paving of the portion of Front Street above mentioned to the width of thirty-six feet fails to show in what part of the street the thirty-six feet in

the place where the injury occurred could have been charged on the adjoining property: *Shelby v. Clagett*, 46 Ohio St. 549. The rule that a want of funds, and an absence of power to raise money or to enforce contributions of labor from its citizens, will free a municipality from liability for defects in its highways does not apply when the city charter gives extensive power of taxation for the purpose of improving its streets and avenues: *Whitfield v. Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596, and note. If a city, by its charter, is charged with the duty of keeping its streets in repair, and has ample means provided by taxation for such purpose, it will be liable for neglect to perform this duty: *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345, and extended note.

INJUNCTIONS TO RESTRAIN JUDGMENTS. — A judgment will not be enjoined, unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered: *Hartford etc. Ins. Co. v. Meyer*, 30 Neb. 135; 27 Am. St. Rep. 384, and note.

CONFLICT OF LAWS. — The amendment of a city charter by prescribing a different mode of making street improvements cannot be construed as repealing the old section as to existing contracts: *Flewelling v. Proctel*, 80 Tex. 191.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. QUINCY.

[186 ILLINOIS, 562.]

STREET ASSESSMENTS. — AN ORDINANCE SPECIFYING THAT A STREET IS TO BE PAVED TO THE WIDTH OF THIRTY-SIX FEET sufficiently specifies the portion to be paved, when the whole street is sixty-six feet wide, and the parts actually taken up by sidewalks occupy thirty feet.

STREET ASSESSMENTS. — LANDS MUST BE REGARDED AS ADJACENT TO A STREET improvement when separated therefrom by sidewalks only.

MUNICIPAL CORPORATIONS. — THE POWER TO IMPROVE STREETS, like other legislative powers, is a continuing one, and the municipal authorities are the exclusive judges of the necessity and propriety of its exercise.

MUNICIPAL CORPORATIONS — STREETS — ABDICATION OF CONTROL OVER. — A municipal corporation has no power to grant any consent, or make any contract, or adopt any ordinance the effect of which would be to relinquish control over its streets, or to abandon its duty to keep them in repair, and any grant conferring upon a railroad corporation the right to use such streets must be held in subordination to the right and duty of the municipality to improve and keep them in repair.

MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF RAILROADS THEREIN. — The right given to a railroad corporation by a municipality to lay down and use tracks in one of its streets is subject to the general right of the public to use the same street. The privilege conferred upon the corporation is not exclusive, but must be shared in common with the general public.

MUNICIPAL CORPORATION — STREETS, CONTROL OVER. — The streets are held in trust for the public use, and are public for all purposes of free and

unobstructed passage. For those purposes a city may improve and control them and adopt all needful rules and regulations for their management and use, but cannot alienate or otherwise dispose of them.

MUNICIPAL CORPORATION — RIGHT TO PAVE STREETS OCCUPIED BY A RAILWAY. — Though a portion of a street is occupied by the tracks of a railway corporation under a grant from the municipality conferring such right, the city council has a right to take measures for paving the street, notwithstanding the fact that the railway has its tracks therein, and is using them from day to day, and the business of the corporation may suffer serious interruption during such paving.

J. F. Carrott and O. F. Price, for the appellant.

W. G. Feigenspan, city attorney, and J. Sibley, for the appellee.

MAGRUDER, J. On June 19, 1889, the city council of the city of Quincy adopted an ordinance for the paving of Front Street between Broadway and Hampshire streets, providing therein that the cost should be paid by special taxation upon the real estate contiguous to the improvement. The commissioners named in the ordinance made an estimate of the cost; their report of such estimate was approved by the city council; an order was entered by the council directing the city attorney to file a petition in the county court for the assessment of the cost of the improvement in accordance with article 19 of the "Act to provide for the incorporation of cities and villages"; on December 27, 1889, the city, by its attorney, filed its petition in the county court of Adams County for the levying and assessing of the special tax for the cost of the improvement provided for in the ordinance; the county court appointed commissioners to assess and levy a special tax upon the real estate contiguous to and abutting upon the portion of Front Street above mentioned; the commissioners filed their report or assessment roll, to which the appellant company, as owner of 650 feet of ground west of Front Street and assessed for \$3,490.50, filed objections; these objections were overruled, and the assessment roll was confirmed. From such judgment of the county court confirming the report of the commissioners this appeal is prosecuted.

The appellant filed six objections, of which the first, third, and fourth may be considered together. The first is, that the ordinance is illegal, invalid, and void. The third is, that the ordinance, which provides for the paving of the portion of Front Street above mentioned to the width of thirty-six feet fails to show in what part of the street the thirty-six feet in

width lie. The fourth is, that the ground belonging to appellant is not contiguous to the improvement named in the ordinance, and therefore cannot be specially taxed for the improvement.

Counsel have not pointed out to us how or wherein the ordinance is illegal and void. It specifies the nature, character, locality, and description of the improvement in accordance with the requirement of the statute as interpreted by this court: *City of Sterling v. Galt*, 117 Ill. 11. It may be, however, that the third objection was intended to specify more particularly the invalidity charged in the first. It appears from the evidence that Front Street between Broadway and Hampshire streets, which intersect it, is sixty-six feet wide, including the sidewalks. It also appears that the municipal code of 1885 of the city of Quincy (sec. 709, p. 220) requires all sidewalks, which may be ordered by the city council, to be constructed under the superintendence of the city engineer, and to be of the width of twelve feet, "unless where they have already been established or may hereafter be ordered some other width by the city council," etc. Appellant's point seems to be, that as the street is sixty-six feet wide and the code requires the sidewalks to be twelve feet wide, after taking out of the sixty-six feet twenty-four feet for the sidewalks on both sides, there would be forty-two feet left, and as the ordinance requires the street to be paved to the width of only thirty-six feet, six feet are unprovided for, and it cannot be determined in what part of the forty-two feet the thirty-six feet lie. It is therefore argued that the ordinance does not specify the locality and description of the improvement; and the contention that appellant's land is not contiguous to the improvement must be based upon the supposition that some part of the six feet is between said land and the thirty-six feet, as counsel do not otherwise explain their fourth objection.

The proof shows that the sidewalks on the east and west sides of Front Street between Broadway and Hampshire streets are fifteen feet wide. E. R. Chatten testifies that he is and has been city engineer of the city of Quincy for twenty years, and has known Front Street during that time and before; that the width of the street — sixty-six feet — includes thirty feet for sidewalks, fifteen feet on each side; that there has been a sidewalk fifteen feet wide on the east side of the street for twenty-five years; that on the west side, the sidewalk consists of the platform of the depot which is fifteen feet

wide; that the space between the sidewalks, which is used as a street, is thirty-six feet wide. This testimony is not contradicted, and in view of it, the ordinance must be regarded as specifying distinctly and definitely where the thirty-six feet to be paved are located. The portion of the street to be paved is that which lies between the sidewalks as they exist. The ordinance itself provides that curbstones shall be set on each side of the street "at the outer line of the respective sidewalks." Section 709 of the code of 1885 refers to sidewalks which may be thereafter ordered by the city council, and expressly excepts those which, like the sidewalks on the portion of Front Street here described, "have already been established."

The objection that the land of appellant is not contiguous to the improvement is as untenable as the objection that the ordinance does not show the location of the thirty-six feet to be paved. Appellant's land lies alongside of the west line of the sidewalk on the west side of the street. It is as contiguous to the street when the sidewalk is fifteen feet wide as it would be if the sidewalk was twelve feet wide. If land is not contiguous to the paved portion of a street, because it is separated therefrom by a sidewalk, then no street with sidewalks could ever be improved by special taxation of contiguous property.

The second objection is, that the ordinance is void because it violates the rights and privileges granted by the appellee to the Northern Cross Railroad Company, to which appellant claims to be the successor, by virtue of a deed executed by appellee to the said Northern Cross Railroad Company, on July 25, 1855. The portion of the deed in question which is material to the point here made is set forth in *City of Quincy v. Chicago etc. R. R. Co.*, 94 Ill. 537. As will be seen by reference to said case, the city of Quincy granted to the Northern Cross Railroad Company the "privilege of making and using two railroad tracks in and along that portion of Front Street which extends from the north line of Broadway south, etc., . . . said right and privilege to be enjoyed and exercised until the sixteenth day of October, 1877," etc. The right or privilege thus granted is the only right or privilege conveyed by said deed to which our attention has been directed, and as said right or privilege could only be enjoyed and exercised until October 16, 1877, and has long since ceased to exist by lapse of time, it is difficult to see how the ordinance violates

any rights acquired under and by virtue of said deed. The second objection is therefore without force.

The fifth objection is, that appellant has, "with the consent and permission of" appellee, maintained one or more tracks in the portion of Front Street above named "for many years last past" in connection with its business and in the passage of cars and locomotives over the same, and that said tracks are still in use by the company, and are necessary in the operation of its railroad, and that the paving of the street as provided for in the ordinance will prevent the company from using the street where its tracks are laid, and that therefore the ordinance is illegal, invalid, and void.

The sixth objection is, that by an ordinance passed on June 25, 1873, by the city council of Quincy, the Toledo, Wabash, and Western railway was authorized to lay down and use a track over Front Street, and to extend the same so as to connect with any other railroad within the city, and to agree with any other railroad company for the joint use of the same, and that, under said ordinance of 1873, the track, now on the west side of the part of Front Street which it is proposed to pave, was constructed many years ago, and, "by mutual agreement between said two railroad companies," has, for many years last past, been used jointly by them in running their locomotives and cars, and that the pavement about to be laid down will impair the rights granted by the ordinance of 1873, and render it impracticable for appellant to use said track and run its locomotives and cars over the same, and that therefore the ordinance of June, 1889, is void.

These objections announce the extraordinary doctrine, that a city loses or surrenders its power to pave or otherwise improve one of its streets if, by tacit consent, or by permission expressed in an ordinance, it has suffered a railroad company to lay down a track in such street, and to use such track for a number of years in running cars and locomotives over it. Such a doctrine is not sustained by reason or authority. The charter of the city of Quincy, as consolidated and amended in 1857, confers the power upon the city council "to lay out, open, alter, abolish, widen, extend, establish, grade, pave, improve, and keep in repair streets, lanes, avenues, and alleys": Private Laws 1857, p. 164, sec. 13. The city has also adopted article 9 of the general incorporation act in regard to cities and villages, passed in 1872. Under the authority conferred by the charter, it was the duty of the city to keep all the streets

within the corporate limits in a reasonably safe condition for the use of the public: *Village of Marseilles v. Howland*, 124 Ill. 547. The power to improve the streets, like other legislative powers, is a continuing one, unless the contrary be indicated: 2 Dillon on Municipal Corporations, 3d ed., sec. 686 (543). The municipal authorities of the city are the exclusive judges of the propriety and necessity of exercising this power: *Dunham v. Hyde Park*, 75 Ill. 371.

Under its charter, and without any other legislative act, the city of Quincy had no power to grant any consent, or make any contract, or adopt any ordinance, conferring upon a railroad company the use of one of its streets, if the effect of such consent, contract, or ordinance would be to relinquish its own control over such street or to abandon its duty to keep the same in repair. In the ordinance of 1873, upon which appellant relies, the city council evinced its intention to retain the control of the street by the provisions therein inserted, regulating the speed of trains, and prohibiting the standing of cars, locomotives, etc., upon the tracks, or at the street crossings, "in such manner as to hinder, impede, or interfere with free travel along, over, or across said street, or any part thereof." The right given to a railroad company by the council of a city to lay down and use a track in one of the streets is subject to the right of the general public to also use such street. The privilege of the company as thus conferred is not exclusive, but must be exercised in common with the general public. The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage: 2 Dillon on Municipal Corporations, 3d ed., sec. 683 (541). "For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but cannot alien or otherwise dispose of them": *City of Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Kreigh v. City of Chicago*, 86 Ill. 407; *City of Bloomington v. Bay*, 42 Ill. 503; *Watson v. Tripp*, 11 R. L. 98; 23 Am. Rep. 420.

Inasmuch, therefore, as the city of Quincy still retained control over Front Street, and continued to be under obligations to keep it in repair after permission was granted to the railroad company to lay its tracks, the city council had the right to take measures for paving the street, notwithstanding the fact that the railroad had its tracks there and was using such tracks from day to day. It may be true that appellant's business will suffer serious interruption from the paving of the

street; but the inconvenience to which appellant may be temporarily subjected can make no difference in the right and duty of the city to make such improvement of the street as it deems necessary. It frequently happens that the business of the individual citizen is injured and interfered with by the construction of a street improvement, but no greater obligation rests upon him than upon the railroad company to submit gracefully to such annoyance. On such occasions, the owners of railways, like other parties desirous of using the street, must endure a temporary inconvenience for the sake of a permanent advantage: *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261.

Upon the trial below, the railroad company placed upon the witness-stand James H. Linsey, its road-master, who swore that it would not be practicable to maintain and operate a railroad on Front Street between Broadway and Hampshire streets if the street should be paved in the manner contemplated by the ordinance. Whether such testimony was competent and material, or not, it was successfully contradicted by the evidence upon the subject introduced by the city. John R. Nevins, a civil engineer and superintendent of public works in Quincy, Thomas Redmond, secretary of the board of public works, and E. K. Stone, superintendent of the Quincy Horse Railway and Carrying Company, all testified that the street with the railroad tracks upon it could be paved in the manner specified in the ordinance, and that, after it should be so paved, cars and engines could be run upon the tracks, and the railroad could be operated thereon.

The judgment of the county court is affirmed.

BAILEY, J. I concur in the judgment of affirmance, but dissent from much of the reasoning of the foregoing opinion of Mr. Justice Magruder.

SHOPE, J. I also concur in affirmance of the judgment, but cannot consent to the reasoning by which that result is reached in the opinion.

CRAIG, J. I do not concur in what is said in the opinion.

MUNICIPAL CORPORATIONS — DISCRETION OF AUTHORITIES AS TO IMPROVEMENTS. — The discretion exercised by a municipal corporation in determining what are proper and needful facilities for commerce, and on what part of a river bank within its limits they should be established, is not a proper subject for judicial control: *Sweeney v. Shakespeare*, 42 La. Ann. 614;

21 Am. St. Rep. 400, and note. The streets of an incorporated town are its highways, subject, in general, to such improvement as its legislative authority may prescribe, due regard being had for private interests: *State v. Mayor* 5 Port. 279; 30 Am. Dec. 564. See also *Lehigh County v. Hefert*, 116 Pa. St. 119; 2 Am. St. Rep. 587, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN STREETS — DELEGATION OF LIABILITY. — Though a city may grant a railroad the right to build tracks and run cars upon its streets, and may impose upon it the burden of keeping them in repair, yet the imposition upon and acceptance of such burden by the company will not relieve the city from liability should the company fail to comply with its obligations: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187, and note. The power to pass ordinances for improving, grading, and paving streets is a legislative power vested in the city council, and cannot be delegated: *Hydes v. Joyes*, 4 Bush, 464; 96 Am. Dec. 311, and note. The powers of corporate authorities over public streets of a city are held in trust for the benefit of the public, and cannot be delegated nor abridged by any act of such authorities: *Milhan v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314.

MUNICIPAL CORPORATIONS — RAILROADS IN STREETS — RIGHTS OF THE PUBLIC. — Streets are established for the accommodation of the public generally, in passing from place to place, and for other necessary uses. They are for the benefit of all, and no one has any exclusive rights or privileges therein: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note. The right of a railroad company to lay its track through the streets of a city is subject to reasonable regulation under the police power of the proper authorities: *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note; note to *Callanan v. Gilman*, 1 Am. St. Rep. 843.

HARTING v. JOCKERS.

[126 ILLINOIS, 627.]

FRAUDULENT CONVEYANCES. — AN AGREEMENT FOR FUTURE SUPPORT, while it is a valuable consideration, is not sufficient to sustain a conveyance, when to do so will operate to the prejudice of the grantor's existing creditors, though no actual fraud was intended by any of the parties to the transaction.

FRAUDULENT CONVEYANCE — PRESUMPTION OF INTENT. — When an act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with fraudulent purpose and intent.

FRAUDULENT CONVEYANCE. — IF A PORTION OF THE CONSIDERATION for a conveyance is an agreement that the grantee will support the grantor, such agreement will be treated as a fraud upon the creditors of the grantor, though the remaining portion of the consideration involved the expenditure of money on the part of the grantee.

FRAUDULENT CONVEYANCES. — THE MERE FACT OF INDEBTEDNESS does not preclude a debtor from providing for his future support by making a transfer in consideration of an agreement to support him, if he retains property amply sufficient for the payment of all his debts, and a provision for such future support is such as a prudent and just man would

make, having due regard to his financial condition and circumstances, and retaining ample property to meet, without hazard, every just obligation.

FRAUDULENT CONVEYANCES. — IF ONE WHO MAKES A TRANSFER IN CONSIDERATION OF AN AGREEMENT FOR HIS SUPPORT has, at the time, property consisting of promissory notes of persons then solvent of an amount double that of his indebtedness, such transfer cannot be assailed by a creditor who made no effort to collect his debt until after the makers of such notes had become insolvent, and such insolvency had so reduced the remaining estate of the transferrer that he was unable to pay his debts.

Joseph S. Carr, for the appellant.

Wiss and Davis, for the appellees.

SHOPE, J. This is a bill in equity, by appellant, to set aside as fraudulent a contract between Jacob Heuster, Sen., and appellee Jockers, by which Jockers received from Heuster two thousand dollars, and in consideration thereof agreed, in building his house, to so enlarge it as to furnish a separate room for Heuster, and to support and maintain him during his life.

It appears that Heuster was, in September, 1884, about eighty-one years old, a widower, and without a home. He was possessed of two thousand dollars in money, personal property to the value of four hundred dollars, a note of one hundred dollars, and three other promissory notes of six hundred dollars each, executed by George Egelhoff and his sons, under the firm name of Egelhoff Brothers. In September, 1884, Jockers applied to Heuster for the loan of two thousand dollars. Heuster asked his purpose in borrowing the money, and upon being told by Jockers that he desired to use it in building a house on his farm, proposed to Jockers that if he would build the house larger, so that he (Heuster) could have a room in it of his own, and Jockers would board him, do his washing, etc., and take care of him while he lived, he would pay him the two thousand dollars which Jockers desired to borrow. To this Jockers consented, and the parties entered into an agreement to this effect. It also appears that Jockers changed the plan of his proposed building at largely increased expense, and provided the room for Heuster as stipulated. A note was taken for the two thousand dollars, signed by Jockers and payable to Heuster, which, upon the house being completed, and Heuster taking possession of his room therein in December, 1884, was surrendered to Jockers by Heuster, and destroyed. Heuster died in April, 1885. The making of this

agreement, the payment by Heuster to Jockers thereunder, and that Jockers in good faith kept and performed the agreement on his part, are not questioned. It also appears that on June 17, 1875, said Heuster, Sen., made and delivered to Jacob Heuster, Jr., a promissory note for \$440, payable in one year after date, bearing ten per cent interest, which, before its maturity, was sold and delivered to appellant. This note, at the time of the transaction before spoken of, had been past due for eight or nine years, and there is no evidence of any attempt on the part of the appellant or others to enforce its payment. After the death of Heuster, Sen., the note was presented against his estate, and was allowed March 11, 1886, being principal and interest at that date, \$1,133. The estate being insolvent, this bill was filed to charge Jockers with the money received from Heuster, or sufficient of it to pay this claim.

It is apparent that at the time of the transaction with Jockers, by which two thousand dollars of Heuster's effects went into Jockers's hands for Heuster's future support, appellant was the creditor of Heuster to the amount of about one thousand dollars. The evidence leaves no doubt that as between the parties the transfer of the money to Jockers was upon a good and sufficient consideration, which was subsequently fully performed by Jockers. The general rule of law, however, is well settled, that a voluntary conveyance or transfer of property by a debtor, as against existing creditors, is fraudulent and void. A debtor may not, by gift or other voluntary transfer of his property to others, or by transfer and conveyance of it for his own use, as for his future support, hinder or delay his creditors in the collection of their just demands. An agreement for future support is a valuable consideration, but being in effect a transfer of property to the use of the grantor, it will be insufficient to uphold the conveyance, when to do so will operate to the prejudice of existing creditors. It is wholly immaterial that no actual fraud is shown to have been intended, for the result would be the same, — that is, to give the debtor the beneficial enjoyment of that which rightfully belongs to the creditor; and the transaction is therefore wanting in the good faith necessary to the validity of the contract. If the act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with that fraudulent purpose and intent: *Moore v. Wood*, 100 Ill. 451; *Emerson v. Bemis*, 69 Ill. 537; *Lukins v. Aird*, 6 Wall. 78; Bump on Fraudulent Conveyances, 246-282.

The fact that appellee may have paid a portion of the consideration for the surrender of his note by Heuster in placing himself in a worse position by the expenditure of one thousand dollars more money in building a larger house for the accommodation of Heuster than he would otherwise have done can be of no avail; for "when it is shown that the present consideration is inadequate to satisfy his debts, whatever may be the amount secured to the debtor, the law, instead of entering upon the task of determining what part of the consideration is money or other property, and what part is to be paid as future support of the grantor, and holding the grantee responsible to the creditors for the latter sum, treats the conveyance as a nullity as between the grantee and the creditors, and holds the property liable for their claims": Bump on Fraudulent Conveyances, 246; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; and cases *supra*. The law, however, admits of qualifications as against existing creditors, when, as said by Mr. Justice Story, "the circumstances of the indebtedment and conveyance repel any presumable imputation of fraud": 1 Story's Eq. Jur., sec. 355. And it has been repeatedly held, and is well settled, that the mere fact of indebtedness will not amount to a prohibition of the debtor's power to make a gift, or provide for his future support or the support of others. If the debtor retains property amply sufficient for the payment of all his debts, he has a right to contract for his support for a longer or shorter period, as he may think best: *Hapgood v. Fisher*, 34 Me. 407; 56 Am. Dec. 663; *Wooten v. Clark*, 23 Miss. 75; *Parker v. Nichols*, 7 Pick. 111; Bump on Fraudulent Conveyances, 247; *Annis v. Bonar*, 86 Ill. 128.

It not infrequently happens that one slightly indebted is called upon to discharge the imperfect obligations owing from parent to child to make reasonable advancements to his children. And so, also, one engaged in active business may regard it as a duty, and justly so, to his wife and children, or others dependent on him for support, to set apart for their use, by conveyance or otherwise, a reasonable portion of his estate, and thereby keep them secure from the evil effects of the reverses of fortune. Where this is done without endangering or interfering with his solvency, or does not tend directly to hinder or delay existing creditors in the collection of their claims, the gift will ordinarily be upheld, as if one making such advancement or provision should retain in his possession ample property, free from encumbrances and accessible to his credi-

tors, sufficient to satisfy and liquidate all just demands against him. So if one, finding himself aged, and possibly decrepit, seeks, by contract for his future support, to secure the necessities and comforts which his declining years and strength demand, he may lawfully use his property for such purposes, and his transfer for that purpose will be upheld, unless the natural consequence of the act is to hinder, delay, or defraud his creditors. If, upon making provision, he retains sufficient property within his control to satisfy all just obligations, no one is injured, and his creditors may, as before the transfer, satisfy their claims by enforcing the same against his property. In all such cases the voluntary conveyance or provision for future support must be such as a prudent and just man would make, having due regard to his financial condition and circumstances, and retaining ample property to meet, without hazard, every just obligation. Where this is done, there is no intent to injure or delay creditors, and no presumption of fraud can arise. It is not necessary that actual insolvency should be proved. It will be sufficient to avoid the conveyance or transfer if there be not ample property retained, or if the withdrawal of the amount used by the debtor in making such provision for his future support will materially lessen his ability to pay his debts.

As before said, Heuster retained in his possession and control substantially four hundred dollars' worth of personal property, and the Egelhoff notes. The case was made to turn in the appellate court, and, as we apprehend, in the circuit court, upon the solvency or insolvency of the makers of the Egelhoff notes at the time of the transaction with Jockers. It is not shown or pretended that Heuster was in debt to any person other than the appellant, or that there were other claims or liens against him. The Egelhoff notes were given for money loaned, and were renewed some months after the transaction with Jockers, without additional security. It would seem clear that Heuster, at least, regarded the Egelhoffs as solvent. It must be apparent that if, at the time of the transfer to Jockers, Heuster held the obligation of solvent persons to the amount here named, he did retain ample means within his own control, entirely accessible to the creditors, to meet and discharge his indebtedness. The circuit and appellate courts, upon consideration of the evidence, have found that the Egelhoffs were solvent, and that no presumption of fraud, or intent to hinder or delay creditors, can be inferred

from the transfer by Heuster to Jockers. We have carefully considered the evidence, and while the burden is upon appellee to overcome the presumption arising from the conveyance or transfer of property to him for the use and benefit of Heuster, by showing circumstances which rebut the presumption of fraud, we are not prepared to say that the lower courts have erred in their finding. It seems that the trial judge heard the testimony of the witnesses, and was therefore better able to determine than we are as to whom credit should be given. It is true that during the following year the Egelhoffs became insolvent, and the debt to Heuster was wholly lost. The subsequent result is competent to be considered, but only as tending to illustrate the condition of affairs at the time of the transaction complained of; and upon consideration of all the facts proved, we are not prepared to say that the circuit court was not justified in holding that Heuster, in making the transfer in his then condition and circumstances, retained ample property for the payment of his debts, so that the presumption of fraud arising from the transfer of his property for his own use and future means of support was overcome and rebutted. While the evidence is not as satisfactory as we might wish, it establishes clearly that Heuster might well rely on the Egelhoff indebtedness as being ample and sufficient to satisfy and discharge all existing claims against him, and while it is ordinarily true that the question of whether sufficient has been retained may be determined by the result, where there is diligent pursuit of legal remedies following shortly after the transfer which is alleged to be fraudulent, it only becomes competent to show such result as tending, as before said, to determine the state and condition of the debtor's estate at the time of the alleged fraudulent transfer of his property. And where, as here, the creditor makes no effort to collect his debt, and it is shown, by the preponderance of the evidence, that the Egelhoffs became insolvent after the transfer to Jockers, such subsequent insolvency cannot be considered as affecting the fairness of the transfer sought to be set aside.

If Heuster, being indebted to the amount of one thousand dollars, had transferred to Jockers the Egelhoff notes, and had placed the two thousand dollars in money openly to his own credit in some solvent bank, where it could be readily reached by his creditors, could any legitimate inference arise that by the transfer to Jockers for his future support, Heuster

intended to hinder or delay the collection of his debts? Manifestly not. A sum double the amount of all his indebtedness would, with the prudence and foresight of prudent business men, have been placed in a recognized safe depository and within easy access by creditors; and although the bank should subsequently become insolvent; and be unable to pay when the creditor might seek to collect his debt, that fact could in no way impeach the *bona fides* of the original transaction.

No good purpose will be served by the discussion of the evidence. It is sufficient that we have given it careful attention, and concur with the appellate and circuit courts in their findings in respect of the facts.

The judgment of the appellate court will be affirmed.

FRAUDULENT CONVEYANCES—AGREEMENTS FOR FUTURE SUPPORT.—A conveyance of land by an insolvent father to a son, in consideration of the latter's promise to support the former and his wife during their natural lives, is fraudulent *per se*, and void as to the existing creditors of the grantor: *Woodall v. Kelley*, 85 Ala. 368; 7 Am. St. Rep. 57. A grantee's promise to support a grantor will not render a conveyance valid in which it is attempted to place property of the grantor beyond the reach of his creditors: *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527, and note. A deed of property made to a minor child in consideration of its services is fraudulent and void as to creditors of the grantor: *Stumbaugh v. Anderson*, 46 Kan. 541; 26 Am. St. Rep. 121, and note; see note to *Crawford v. Kirksey*, 28 Am. Rep. 721.

FRAUDULENT CONVEYANCES—PRESUMPTION.—If a conveyance is voluntary, and results in hindering, delaying, or defrauding creditors, it must be regarded as fraudulent: *Marmon v. Harwood*, 124 Ill. 104; 7 Am. St. Rep. 345, and note. Voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent as against existing creditors: *Driggs etc. Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note; see note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739.

FRAUDULENT CONVEYANCES.—Future support of a grantor by a grantee as the consideration for a conveyance is not void if the debtor retains sufficient property to pay his debts at the time of the conveyance: *Hapgood v. Fisher*, 84 Me. 407; 56 Am. Dec. 662.

**PEORIA AND PEKIN UNION RAILWAY COMPANY v.
UNITED STATES ROLLING STOCK COMPANY.**

[126 ILLINOIS, 642.]

COMMON CARRIER. — A RAILWAY CORPORATION RECEIVING CARS FROM A CONNECTING LINE of road for transportation over its line becomes, in the absence of a special contract, a common carrier of the cars, as well as of the freight therein.

COMMON CARRIER, SUSPENSION OF LIABILITY OF. — If a railway corporation receives cars to be delivered to the consignees of the freight therein, to be by the latter unloaded, after which the cars are again to be taken possession of and transported to a storage-yard, such cars, while being unloaded by the consignees, are not in possession of the railway corporation, and the liability of the latter as a common carrier is suspended, and it is not therefore liable for the loss of the cars by fire, without its fault, while in possession of the consignees.

THE defendant was a railway corporation having large terminal facilities in the city of Peoria and tracks leading from its own and other railroads to various industries in and near the city. The defendant, as a part of its business, was in the habit of receiving the cars of other corporations upon their tracks and transporting them to their places of destination in the city, where they were left with the consignees of the freight therein until they were unloaded, after which it was the duty of the defendant to retake possession of the cars and transport them to its storage-yards and there keep them until called for. The defendant received a number of cars of the plaintiff consigned to the Peoria Sugar Refinery, and transported them to such refinery, and left them there to be unloaded by the employees of the refinery. The refinery, while the cars were standing on the track by its side, was destroyed by fire, in which destruction the cars were also involved. Whether they had been unloaded before being destroyed did not appear. The plaintiff claimed that at the time the cars were burned they were in the possession of the defendant as a common carrier, and that it was liable as such for their value. The judgment of the trial court was in favor of the plaintiff, and the defendant thereupon prosecuted a writ of error.

Stevens and Horton, for the appellant.

H. W. Wells, for the appellee.

SHOPE, J. It is stated by counsel for appellee: "The only question in the case is, Was appellant liable as a common carrier of the cars, and was its liability as to the cars terminated

before the cars reached their destination, — that is, the storage-yard? In other words, did the stoppage to unload freight complete the transportation of the cars which were destined for another point?" Other points are made by appellant as to the right of appellee to recover, which, in the view we take of the case, it will be unnecessary to discuss or determine. No negligence is charged, and the only question is, Was appellant liable as common carrier of the cars at the time of their destruction?

In *Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 109 Ill. 135, 50 Am. Rep. 605, we held that a railroad company receiving cars from a connecting line of road for transportation over its line became, in the absence of a special contract, a common carrier of the cars, as well as of the freight therein. We are of opinion that the doctrine there announced is sustained both by reason and authority: *Mallory v. Tioga R'y Co.*, 39 Barb. 488; *East St. Louis Connecting R'y Co. v. Wabash etc. R'y Co.*, 123 Ill. 594; *Missouri Pacific R'y Co. v. Chicago etc. R. R. Co.*, 25 Fed. Rep. 317.

The facts conceded establish that the cars in question were taken by appellant, by the order and direction of the person who had authority to control the same, from the side-track of appellant's road, where they had been left by the transporting company, and were by it delivered, upon appellant's tracks, to the sugar refinery, the consignee of the freight contained in the cars, to be by the consignee unloaded, when it would become the duty of appellant to transport the cars to its storage-yard, where, ordinarily, they could remain until needed in the course of business. It is also conceded that the appellant company had no duty in respect of the unloading of the cars, and no control in fixing the time they should remain at the industry for that purpose. It appears, however, that the sugar refinery was slow in unloading consignments to it, and the record is wholly silent as to whether the cars had or had not been unloaded when they were burned.

The point is sharply made by counsel, upon the refusal of the court to hold the fourth proposition submitted by the defendant as to the burden of proof, as to whether the cars had been unloaded at the time of the fire. By that proposition the court was asked to hold, in substance, that if the cars, just previous to their destruction, had been delivered to the defendant, by the receiver of the transporting line, to switch to the Peoria Sugar Refinery to be unloaded, and thence, when un-

loaned, to the storage-yard of the defendant, and defendant did switch the cars to the Peoria Sugar Refinery to be unloaded, as it was directed, and the defendant had nothing to do with the unloading, but that it was to be done by the refinery, and when destroyed the cars were on such track where the defendant was directed to place them by the receiver or his agent, if proved, and had not then been unloaded, of which issue the burden of proof is on the plaintiff, then plaintiff cannot recover, etc. The court struck out the words, "of which issue the burden of proof is on the plaintiff," and added to the proposition the following: "And the burden of proof is on the plaintiff to make out its cause of action; but the relation of common carrier being once shown, the burden is shifted to the defendant to show that at the time of the loss its liability as such had terminated."

It is manifest that in determining the question thus raised it will be necessary to consider the proposition of counsel before quoted, — that is, whether the stoppage to discharge the car of its freight, and over which appellant had no control, changed the liability of appellant during such stoppage, although the car, after being unloaded by the consignee of the freight, was to be again taken by the appellant to its yards for storage.

It is insisted that *Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 109 Ill. 135, 50 Am. Rep. 605, has determined this question favorably to appellee, and it must be conceded to be so unless that case is distinguishable from the one at bar. It is stated in the opinion of the court in that case, that the Chicago, Rock Island, and Pacific Railway Company placed upon the transfer-track of appellant company a car, to be transferred by the latter over its switch-tracks to the Monarch Distillery, consignee of the contents of the car. The car was taken by appellant company, delivered to the consignee on appellant's tracks, and unloaded, and was afterwards taken by appellant, without the knowledge or consent of the Chicago, Rock Island, and Pacific Railway Company, to another industry, to be there reloaded, and at which it was destroyed by fire. From the statement thus made, it appears that at the time of the destruction of the car it had been retaken by appellant company from the Monarch Distillery and transported elsewhere to be loaded, without authority of the owner company. It is stated that there was evidence tending to show an understanding among the connecting railroads doing business with

appellant, that if other shippers desired cars, appellant, without any specific order to that effect, was at liberty to place them in position to be loaded, and then return them to the company owning the cars, to be shipped, and that such cars were delivered by appellant under the order of the industry at which they were burned; yet that fact seems not to have affected the determination of the cause, and the case was made to turn upon the fact that defendant had exclusive control of the car while on its tracks, and was under obligation to return the same to the owner company when unloaded by the consignee. If the car had been destroyed at the distillery while there to be unloaded by the consignee of the goods therein, it seems to us that a different question would have arisen; but the defendant assumed control of the car after its freight was discharged, and instead of returning it to the owner, took it elsewhere, where it was destroyed. It was held in that case, that the Chicago, Rock Island, and Pacific Railway Company, having parted with the care and control of the car, and having intrusted it to the defendant, could not, at any point on its road, interfere for its safety, and that the duty attached to appellant to return the car to the owner, and it was therefore liable as a common carrier. There was no duty to return the car until delivered at the distillery and the freight had been unloaded, but such liability arose, if at all, upon appellant's again assuming control of the car to remove it from the distillery.

In the case at bar, appellant received from the transporting line (appellee's lessee), in the regular course of its business, the cars in question, to be transported over its tracks to the sugar refinery, there to be left standing, on appellant's tracks at the refinery, until unloaded by the consignee of the contents of the cars. Having nothing to do with the unloading, and having delivered the cars on the track at the refinery, its whole duty as common carrier of the freight contained in the cars was at an end. The transit of the goods had terminated, and the cars on the track were so far delivered into the control of the refinery as to enable it to discharge the freight. It is not questioned that there was a complete delivery of the cars and contents to the refinery in proper time and manner, and at the proper place, for the purposes contemplated, — that is, that the refinery company might unload the freight. Appellant had no control of the time such cars should remain at the refinery for such purpose, — that, it would seem from the

course of business, was in the discretion of the consignee of the freight. While transporting the cars, and in complete, uninterrupted control of them, appellant was liable, as a common carrier, for injury to these cars, not caused by the act of God or the public enemy: *Mallory v. Tioga R'y Co.*, 39 Barb. 488; *Vermont etc. R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen, 462; 92 Am. Dec. 785; *Atchison etc. R'y Co. v. Denver etc. R. R. Co.*, 16 Am. & Eng. R'y Cas. 57; *Missouri Pacific R'y Co. v. Chicago etc. R. R. Co.*, 25 Fed. Rep. 317.

By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended, as to the cars, for an indefinite period, the duration of which was to be determined, not by appellant, but by the consignee of the goods. Until the consignee had unloaded the cars, appellant had no right to remove them, and take them to its storage-yard, or other place of safety. The course of business, as well as the contract of appellant with the connecting lines, contemplated that upon switching the cars to the industries reached by appellant's tracks, the cars were to be permitted to stand upon such tracks, to suit the convenience of the consignee of the good shipped, and while the contracting roads undoubtedly might have limited the time for the stoppage of the cars for the purpose of unloading, it does not appear that they did so, or that any custom or usage prevailed that would fix the same.

In the case of *Missouri Pacific R'y Co. v. Chicago etc. R. R. Co.*, 25 Fed. Rep. 317, ten loaded cars were received by the one road for transportation over its lines from the other, and it was held liable, as a common carrier, for all injuries received by the cars while *en route*; but it was held that if destroyed after the carriage had terminated, and there had been a delivery, or a tender to deliver, to the consignee, there was, as to the cars, no liability as a common carrier, and although the cars remained on the tracks of the transporting company, its liability was that of a warehouseman only.

In *East St. Louis Connecting R'y Co. v. Wabash etc. R'y Co.*, 123 Ill. 594, the cars, laden with coal, had been delivered to the connecting railway company for delivery to the consignee, and were taken by the latter from the tracks of the connecting company, over its private tracks, to be discharged of their freight, after which they were to be redelivered to the connecting company, to be returned to the owner. While in the possession of the consignee, the cars were burned, and it

was insisted that because the cars were to be returned to the owner company by the connecting company, it was liable as common carrier of the cars; that the contract of carriage not being complete until the cars were returned to the owner company, the liability as a carrier continued. But it was held that as the cars were shoved upon the consignee's private tracks, in conformity with the previous course of business, they had reached their destination, and that consequently the liability as common carrier of them ceased. It was also there said: "Had the glucose company (consignee) unloaded and returned them, as it was the custom to do, the defendant's liability as a common carrier would have commenced anew, and continued until they were delivered to appellee." It is true, in that case, the cars were placed on the private tracks of the consignee, and taken a few hundred feet away from the connecting railway company's track, to be discharged of their freight; but that cannot, in our opinion, distinguish the case from the one at bar, in principle. It was in contemplation of the parties that the car was to be taken to a point upon the railroad, and was there to be delivered to the consignee, and it cannot be important whether the car was taken a few feet off of appellant's tracks or left standing thereon, in considering whether the liability as insurer continued. In either case the car had passed from that absolute control of appellant to which it is entitled as a common carrier, and it must be held that when the car and its contents were delivered to the consignee, on the switch-track of the appellant, at the industry to which they were consigned, the car had reached its destination, and that while the car was under the control of the consignee, the liability of the carrier was suspended, to again attach when the car was ready for further transportation to the storage-yard of the appellant. In the interim, which might be for a shorter or longer period of time, as determined by a party over whom appellant had no control, and for whose acts it was in no wise responsible, appellant, although the cars were standing upon its switch-tracks, would have no such control as would authorize it to take the cars elsewhere for safety, and it would be manifestly unjust, and inconsistent with the reason for applying the rule, to hold appellant responsible during that time as an insurer.

The trial court was correct in its holding that "the relation of common carrier being once shown," it is presumed to continue, and the burden is on the carrier to show that at the time of

the loss its liability as such had terminated. This, however, was done by showing delivery to the consignee, and if, in further disposition of the cars, under the contract of the parties, or in the usual course of business, the liability again attached, the burden was upon plaintiff to show it. If the cars were delivered to the consignee until unloaded, and the liability as common carrier ceased while the same were in its custody, such liability would not revive or again attach until the cars were unloaded. As we have seen, the case does not proceed upon the basis, nor is it contended, that appellant was guilty of negligence in not removing the cars after they were unloaded, or is guilty of negligence in any other respect.

We are of opinion that, in view of the facts shown and admitted, the court erred in holding that the liability of appellant was that of common carrier, and that if plaintiff intended to rely upon the duty of appellant to remove the cars to its storage-yard, the burden was upon it to show that the duty had attached.

The judgments of the appellate and circuit courts are reversed, and the cause remanded.

RAILROADS AS CARRIERS OF CARS OF CONNECTING LINES.—A railroad company is liable as a common carrier for injuries to the cars of connecting lines while they are in transit over its road, and which it receives, with their passengers and freight, into its exclusive custody and control: *Vermont etc. R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen, 462; 92 Am. Dec. 785, and note; *Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 109 Ill. 135; 50 Am. Rep. 605. When, by agreement between connecting railroads, the defendant was to receive plaintiff's cars for delivery at a point on the defendant's line and return them in as good condition as when received, ordinary wear and tear excepted, and both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars, if without fault of the defendant certain of the plaintiff's cars were burned while being thus transported over the defendant's line, the latter are not liable: *St. Paul etc. R. R. Co. v. Minneapolis etc. R'y Co.*, 26 Minn. 243; 37 Am. Rep. 404.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

BANNON v. ROHMEISER.

[90 KENTUCKY, 43.]

MUNICIPAL CORPORATIONS'—STREETS — POWER OF LEGISLATURE OVER. —

Where an alley has been occupied and used as a highway by an owner of adjacent lots long enough for him to have acquired the right to use it without obstruction, the legislature has no power to pass an act closing it, in whole or in part, without the consent of or compensation to the abutting lot-owner, whether the alley has been formally dedicated to the public use or not.

H. M. Lane, for the appellant.

O'Neal, Jackson, and Phelps, and John Coakley, for the appellee.

LEWIS, J. Appellant owns a lot of land in Louisville, fronting 95 feet on Thirteenth Street, extending west 200 feet to an alley 20 feet wide, and another fronting 180 feet on Fourteenth Street, extending east to the same alley, both bounded on the south by an alley 40 feet wide, that extends from one to the other street.

Appellee owns and occupies a small lot likewise fronting on Thirteenth Street, and extending to the first-named alley, which lies north of, but not adjoining, the lot of appellant, there being between them a small lot belonging to and occupied by another person.

April 13, 1888, the general assembly passed the following act: "That the south ninety-five feet of a certain alley in the city of Louisville, running north and south, between Lexington and Maple streets and Thirteenth and Fourteenth streets, be, and the same is hereby, closed as a public highway."

Acting upon the right supposed to be conferred by the statute, appellant, soon after the enactment, took possession of that part of the twenty-foot alley described, commenced erection of a building thereon, part of a large structure used in manufacturing and storing sewer-pipes and terra-cotta goods, and had dug a cellar in the alley, and progressed with the building thereon, two stories high, when, April 21, 1888, appellee instituted this action, and obtained an injunction against obstruction of the alley; and by the judgment appealed from that injunction was made perpetual, and appellant commanded to restore, within twenty days, the alley of its former condition.

That part of it authorized by the act to be closed binds wholly upon land owned by appellant, and the only other injury or inconvenience that can result to appellee, besides the possible damage from impediment of surface drainage, easily removed, consists in being denied egress from rear of her premises to the forty-foot alley, and thence to either of the two streets named; but neither of the two alleys has been improved, and both remain in their natural state; and the evidence shows the forty-foot alley has for some time, without protest or objection from appellee, been used by appellant as a receptacle for materials connected with his business, so as to partially obstruct it; besides, connection by it with Fourteenth Street, which is occupied by railroad tracks, is practically of no value, while curbstones have, by authority of the city, been placed across it along Thirteenth Street, rendering outlet by that way impossible for vehicles, and so outlet by another alley connecting the two streets north of the forty-foot alley, and but little farther than it from appellee's lot, is almost entirely used by her and others occupying lots north of appellant.

Nevertheless, title to the lot now occupied by her, as has been repeatedly held by this court, carries with it the right "to the common and unobstructed use of the contiguous highway, so far as may be necessary for affording her certain incidental easements and services, and a convenient outlet to other streets; and of this right the legislature cannot deprive her without her consent, or a just compensation in money": *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289; 38 Am. Dec. 497; *Transylvania University v. City of Lexington*, 8 B. Mon. 27; 38 Am. Dec. 173; *Gargan v. Louisville etc. R'y Co.*, 89 Ky. 212. And as said substantially in the last cited case, her property might be increased in value by obstructing or

closing the forty-foot alley; still, if the right of ingress or egress is taken from her, wholly or partially, so as to work an injury, it is taking private property without first making just compensation.

By its charter, "the city of Louisville may at any time institute suit in the Louisville chancery court for the purpose of closing up any of its streets or alleys dividing any of the lots or squares thereof, and to such suit all the owners of ground on the square or lot shall be made defendants; and if such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render a decree accordingly; but without such consent, said court shall hear proof made by the parties, and if satisfied that the closing up would be beneficial to said city, and not injurious to any party not consenting, shall render a decree closing up such street or alley."

But although, whether formally dedicated to public use or not, the alley has been occupied and used as a highway by appellee and others owning adjacent lots long enough to have acquired the right to use it without obstruction, appellant did not proceed to have it closed in the mode provided for by the charter. On the contrary, his only right to close or obstruct is in virtue of the act mentioned, which not only precludes any inquiry whether injury would be done thereby, but absolutely denies right of appellant to the easement, an incident of her title to the lot.

There is therefore no escape from the conclusion the act is invalid, and that the judgment must be affirmed.

STREETS — POWER OF LEGISLATURE OVER. — An abutting owner, the fee of a street being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to any other purpose without compensation: *Abendroth v. Manhattan R'y Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461, and note. Abutters on a suburban highway have a right therein which the legislature cannot take away, except for public use, upon payment of compensation: *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577; 19 Am. St. Rep. 113, and note; *Moose v. Carson*, 104 N. C. 431; 17 Am. St. Rep. 681, and note. The legislature has power to vacate a public street without the consent of the persons whose private interests are or may be affected by it. Surrendering the right of way to the owners of the soil is not taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance are not entitled to compensation: *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649, and note.

HISE v. HARTFORD LIFE INSURANCE COMPANY.

[90 KENTUCKY, 101]

INSURANCE ON HUSBAND'S LIFE — VALIDITY AS AGAINST CREDITORS. — When a husband who has insured his life for the benefit of his wife and children dies insolvent, the insurance is valid against his antecedent or existing creditors, if, at the time it was procured, his indebtedness was not such as to affect his credit or ability to pay his debts, and the amount invested in the insurance was not such as to materially affect the rights of creditors.

INSURANCE, WHEN A FRAUD ON CREDITORS. — Under the Kentucky statute, insurance on his life, made by a husband, whether insolvent or not, for the benefit of his wife and children, is valid as against his creditors, unless the insurance is made to defraud them, in which case only the premiums paid shall be subject to his debts. In such case, insurance in unreasonable sums, made by an insolvent husband, is sufficient evidence of fraud to subject the premiums paid to the payment of his debts.

R. T. Colston, for the appellants.

Thomas B. Fairleigh and Newton G. Rogers, for the appellees.

BENNETT, J. Joseph S. Hite, now deceased, qualified as the guardian, in 1867, of the appellants, and received an estate belonging to them, about thirteen thousand six hundred dollars, consisting of bonds. In 1868 and 1869, after said qualification and receipt of said bonds, he insured his life in the appellees' companies for the benefit of his wife and children, which sums amounted, in the aggregate, to about thirty-two thousand dollars. The premiums on these sums were paid annually until 1871, including that year, when the said Hite ceased to pay any more premiums, and for the premiums already paid he took a paid-up policy, likewise for the benefit of his wife and children. In the course of two or three years thereafter, said Hite became hopelessly insolvent, and later on he died. These suits were instituted by the appellants, his former wards, against the said insurance companies and said wife and children, to subject said policies to said demands, upon the grounds, — 1. That the investment for the benefit of said Hite's wife and children was in the nature of a gift, and therefore void as to existing creditors; and 2. That it was intentionally fraudulent as to said creditors.

The proof shows that said Hite, at the time he took out said policies for the benefit of his wife and children, and the payment of the premiums thereon, was not insolvent; that he was in debt, but not to the extent of his ability to pay, nor to

the extent of affecting his credit, nor to the extent of materially impairing his ability to pay, nor to the extent of materially affecting the rights of creditors by investing as much as between five thousand and six thousand dollars (this was the sum invested in the paid-up policy) in a policy for his wife and children,—nine children in all,—the most of whom were infants, and one of whom, an infant, was a cripple.

It was held in the case of *Stokes v. Coffey*, 8 Bush, 533, that an insurance by the husband for the benefit of his wife and children was not within the statute of voluntary conveyances, consequently was not, *per se*, fraudulent as against antecedent creditors; but if said insurance did not materially affect the rights of such creditors by withdrawing the money that they were entitled to receive from the insurer on account of his indebtedness to them, the insurance for the benefit of his wife and children would be valid as against said creditors. It was also held that an insolvent husband might insure his life for the benefit of his wife and children in a reasonable sum, and the same would not be subject to the payment of his debts, provided his wife had not a sufficiency of estate of her own with which to support herself and children, and to educate the latter.

This decision was rendered without reference to the act of 1870, which provides, in substance, that insurances made by husbands, whether insolvent or not, for the benefit of their wives and children, are valid as against creditors, unless the insurance is made with the intention to defraud creditors, in which case only the premiums paid on such policies shall be subject to their debts.

This court, in the case of *Thompson v. Cundiff*, 11 Bush, 567, decided that this act, while it did not control, as matter of statutory obligation, insurances theretofore effected, should be received as a legislative interpretation of such policies to the effect that they were valid, though made by an insolvent husband against existing creditors, to the extent that the "sum was reasonable"; that in no case could said policies be successfully attacked by antecedent creditors, except for intentional fraud, and insurances by insolvent husbands for the benefit of their wives and children in unreasonable sums would be sufficient evidence of such fraud, and would subject the premiums paid to the debts of such creditors.

The judgment is affirmed.

INSURANCE ON LIFE, WHEN A FRAUD ON CREDITORS. — The question as to whether or not insurance effected by a debtor on his life for his own benefit, or for that of his wife and children or other relatives, is to be considered a fraud on his creditors, is fully treated in a note appended to *Appeal of Elliott's Executors*, 88 Am. Dec. 530. Since that note was written, the subject has been presented to the supreme court of the United States for its consideration in the case of *Central Bank of Washington v. Hume*, 128 U. S. 195, where it was decided, independently of any statute, that a husband may rightfully devote a moderate portion of his earnings to insure his life, and thus make reasonable provision for his family after his death, even though he is insolvent when he effects such insurance and afterwards, without being thereby held to intend to hinder, delay, or defraud his creditors, provided no such fraudulent intent is shown to exist, or must necessarily be inferred from the surrounding circumstances. It was also determined in that case that the payment of premiums to a life insurance company by a husband, who was insolvent at the times of the payment, in order to effect and keep alive an insurance on his own life, made by his wife for the benefit of herself and their children, is not in itself or necessarily a fraudulent transfer of his property with intent to hinder, delay, or defraud his creditors, within the meaning of the statute of 13 Eliz., c. 5, and in the absence of specific circumstances showing a fraudulent intent, his creditors after his death will have no interest in the insurance money. To maintain an action on behalf of creditors of the deceased husband against an insurance company to recover back premiums paid by him while insolvent in order to provide for his wife and children, it must be alleged and proved that the insurance company participated in the fraud.

In delivering the opinion, the court (Mr. Justice Fuller) said: "Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz., c. 5, and inure to the benefit of his creditors, as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched is within neither the letter nor the spirit of the statute.

"In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And when a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that as against creditors his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer within the statute, and this even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such fund from them and dealt with it by way of bounty: *Freeman v. Pope*, L. R. 9 Eq. 206; L. R. 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is, that it removes the property of the debtor out of the reach of his creditors: *Orenish v. Clark*, L. R. 14 Eq. 184, 189. But the rule applies only to that which the debtor could have made available for the payment of his debts. For instance, the exercise of a general power of appointment

might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power, because in the latter case the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit: *May on Fraudulent Conveyances*, 23. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance. A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an insurable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment; yet if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds would go to the estate of the debtor: *Knob v. Turner*, L. R. 9 Eq. 155. The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him, and he pays the premiums and survives them, it might be reasonably claimed, in the absence of a statutory provision to the contrary, that the policy would inure to his estate. In *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60, 64, 19 Am. Rep. 530, the wife insured the life of the husband, the amount insured to be payable to her if she survived him, if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The court held that under the provisions of the statutes of that state, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy that the grandson was entitled to his father's share, the wife having died before the husband, but that in the absence of the statute 'it would have been a fund in the hands of his representatives for the benefit of creditors, provided the premiums had been paid by him.' So in the case of *Anderson's Estate, Hay's and Kerr's Appeal*, 85 Pa. St. 202. A. insured his life in favor of his wife, who died intestate in his lifetime, leaving an only child. A. died intestate and insolvent, the child surviving, and the court held that the proceeds of the policy belonged to the wife's estate, and under the intestate laws was to be distributed, share and share alike, between her child and her husband's estate, notwithstanding, under a prior statute, life insurance taken out for the wife vested in her, free from the claims of her husband's creditors; but if the wife had survived, she would have taken the entire proceeds. We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the

beneficiaries to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named: *Bliss on Life Insurance*, 2d ed., 517; *Glanz v. Gloeckler*, 104 Ill. 573; 44 Am. Rep. 94; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 328; *Gould v. Emerson*, 99 Mass. 154; 96 Am. Dec. 720; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157. This must ordinarily be so, where the contract is directly with the beneficiary, in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured, and where the proceeds are made to inure by positive statutory provisions."

"The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, has been repeatedly recognized by the courts. Thus in *Elliott's Appeal*, 50 Pa. St. 75, 83, 88 Am. Dec. 525, where the policies were issued in the name of the husband, and payable to himself or his personal representatives, and while he was insolvent were by him transferred to trustees for his wife's benefit, the supreme court of Pennsylvania, while holding such transfers void as against creditors, say: 'We are to be understood, in thus deciding this case, that we do not mean to extend it to policies effected without fraud directly, and on their face for the benefit of the wife, and payable to her; and such policies are not fraudulent as to creditors, and are not touched by this decision.' In the use of the words 'without fraud,' the court evidently means actual fraud, participated in by all parties, and not fraud inferred from the mere fact of insolvency; and at all events, in *McCutcheon's Appeal*, 99 Pa. St. 133, 137, the court say, referring to *Elliott's Appeal*, 50 Pa. St. 75, 88 Am. Dec. 525: 'The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13 Elizabeth. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount also issued in the wife's name. . . . The question of good faith or fraud only arises in the latter case; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name or for the benefit of the beneficiary, the title is good, notwithstanding the claims of creditors. . . . There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in case of the assignment of a policy that once belonged to the assured that the question of fraud can arise under this act.' And see *Aetna National Bank v. United States Life Ins. Co.*, 24 Fed. Rep. 770; *Pence v. Makepeace*, 65 Ind. 374; *Succession of Hearing*, 26 La. Ann. 326; *Stigler's Ex'r v. Stigler*, 77 Va. 163; *Thompson v. Cundiff*, 11 Bush, 567. Conceding, then, in the case in hand, that Hume paid the premiums out of his own money when solvent, yet as Mrs. Hume and the children survived him, and the contracts covered their

insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company, is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer."

"But even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries, for the reasons already stated. Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do (*Thompson v. American etc. Ins. Co.*, 46 N. Y. 674) and as she does (and the same remarks apply to the children), then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors? and can the decree against her be sustained on that ground? If, in some cases, payments of premiums might be treated as gifts, inhibited by the statute of Elizabeth, can they be so treated here? It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency is not contended."

"In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible."

"This argument, in the interest of creditors, concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as in morals, should be extended to protect them from destitution after the debtor's death by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already or which could thereby be lawfully obtained, at least to the extent of requiring that under such circumstances the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such an intent on the part of Mrs. Hume or the insurance

companies could be inferred, in our judgment none of these premiums can be recovered": *Central Bank of Washington v. Hume*, 128 U. S. 203.

The rights of creditors of an insured debtor as against beneficiaries are largely determined by the statutes of the several states. These statutes are generally considered as exemptions, and liberally construed. The great weight of the later authorities is in accord with the rule established in *Central Bank of Washington v. Hume*, 128 U. S. 195, to the effect that an insolvent husband or his wife may insure his life and keep such insurance alive for the benefit of the wife and their children, or the husband may insure his life in his own name and subsequently assign it for the benefit of his wife and children, his children alone, or his next of kin, without thereby being held to intend to hinder, delay, or defraud his creditors, and after his death they will have no interest in the insurance money, but it will belong to the beneficiary absolutely: *Harvey v. Harrison*, 89 Tenn. 470; *Pinneo v. Goodspeed*, 120 Ill. 524; *Tompkins v. Levy*, 87 Ala. 263; 13 Am. St. Rep. 31; *Baron v. Brummer*, 100 N. Y. 372; *Johnson v. Alexander*, 125 Ind. 575; *Felruth v. Schonfield*, 76 Ala. 199; 52 Am. Rep. 319; *Fearn v. Ward*, 65 Ala. 33; *Chapin v. Fellowes*, 36 Conn. 132; 4 Am. Rep. 49; *McCutcheon's Appeal*, 99 Pa. St. 133.

In *Pinneo v. Goodspeed*, 120 Ill. 524, it was decided that when a husband procures a policy of insurance upon his life, payable to his wife, she will take all the benefit thereof, to the exclusion of the creditors of her husband's estate. So under the Tennessee statute, although the widow alone is named as beneficiary in a policy of insurance taken by the husband upon his life, yet the insurance is exempt to her from all claims of his creditors. This exemption is valid as against his creditors existing at the inception of the insurance, without regard to its amount, and although the assured has been and continues to be insolvent, devoting his entire estate to the payment of premiums: *Harvey v. Harrison*, 89 Tenn. 470.

In *Johnson v. Alexander*, 125 Ind. 575, a husband in his lifetime procured insurance upon his own life, payable on his death to his executors, administrators, or assigns. Subsequently, he assigned and delivered the policy, with the consent of the company, to certain of his creditors, taking an agreement from them, in writing, to keep up the insurance on his life, and upon his death, and the payment to them of the amount of their debts, with interest and all premiums paid, to pay the balance to his heirs, or to his order. The assignees paid the premiums, and kept up the policy until the death of the insured, who died without making any further order as to the disposition to be made of the insurance. After reimbursing themselves, the assignees had a balance on hand which was paid by them to the administrator of the deceased. The widow and heirs of the deceased claimed the surplus of his life insurance in the hands of his administrator, and their claim was resisted by an unsecured creditor of the deceased husband. The court decided that the money belonged to the widow and children, that the assignment of the policy was not in fraud of creditors, but valid, and transferred the surplus to the heirs of the deceased husband.

In *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49, a policy of insurance on the life of a husband, issued upon the application of his wife, payable to her, and in case of her death before her husband's, to be paid to her children. She died before her husband, leaving children surviving her, and after her death the husband surrendered the policy, taking out another for the same amount in his own name and for his sole benefit, the new policy being upon the same premium, and dated back so as to be of the same date as the old

one. After paying one year's premium on the new policy, the husband died insolvent, and the court decided that in equity the substituted policy belonged to the children, and that they, and not the creditors of the husband, were entitled to the insurance money.

In *Baron v. Brummer*, 100 N. Y. 372, 375, Miller, J., in delivering an opinion on this subject, said: "There is no force in the position that this policy is a chose in action as to creditors, and can be reached by the appointment of a receiver in proceedings for that purpose. The law of 1840 excepts policies of insurance on the life of the husband for the benefit of the wife from the claims of the representatives of the husband, or of any of his creditors, except where the amount of premium paid exceeded a certain sum per annum, and this provision was followed subsequently by amendments of a kindred character, which established the settled policy of the legislature to relieve life insurance policies in certain cases from the payment of the debts of creditors. Under these various provisions, it was the intention of the legislature, as settled and determined by the courts in the cases already cited, that such policies should not be subjected to the lien of creditors, either of the husband or the wife,—as to the former, by the express words of the statute, and as to the latter, by the determination of the courts; and there is no ground for claiming that either the policy or the proceeds which might arise from the same before such payment is made are subject to be reached in advance by a creditor, or that the policy can be assigned and held by the decree of a court of equity for the benefit of creditors until it becomes due and payable."

Under a similar statute in Alabama, allowing a married woman to insure the life of her husband for her benefit, free from the claims of his creditors, provided that not more than five hundred dollars shall be paid out of the husband's funds in annual premiums, the substance of the statute is deemed to be in the nature of an exemption law, to be liberally construed to effect its purpose and policy; and whether the insurance is taken out by the wife with money furnished by the husband, or by the husband without the knowledge or agency of the wife, it is within the protection of the statute, so long as it is for the benefit of the wife or their children, and cannot be reached by the husband's creditors, unless the annual premiums paid exceed five hundred dollars: *Felrath v. Schonfield*, 76 Ala. 199; 52 Am. Rep. 319; *Tompkins v. Levy*, 87 Ala. 263; 13 Am. St. Rep. 31. Under a similar statute in Missouri, it was decided that it was the purpose of the act to allow an insolvent husband to secure to his wife the benefit of an insurance on his life, free from the claims of creditors, when the annual premiums do not exceed the amount named in the statute, but not when they exceed that amount. The statute, however, does not place any restriction upon a solvent husband so as to curtail his right to apply as much of his means as he may choose annually to the payment of premiums on his life for his wife's benefit; and in a case where the annual premiums exceeded the amount named in the statute, and part were paid by the husband while solvent, and the remainder after he became insolvent, the proceeds of the policy should be distributed between the widow and the creditors of the deceased, in the proportion that the premiums paid by him when solvent bear to those paid after his insolvency: *Pullis v. Robinson*, 73 Mo. 201; 39 Am. Rep. 497.

Some of the cases, while recognizing the doctrine that a husband, whether insolvent or not, may take out and maintain life insurance in the name and for the benefit of his wife or children, or both, free from the claims of creditors, still held that a voluntary assignment to his wife and children, by an

insolvent husband, of a life insurance policy payable to himself, his executors, administrators, or assigns, is fraudulent and void, and the insurance money may be reached in equity by creditors, and subjected to the payment of their debts: *Ionia County Savings Bank v. McLean*, 84 Mich. 625; *Burton v. Farinholt*, 88 N. C. 260; *Fearn v. Ward*, 80 Ala. 555. To the contrary: *Succession of Hearing*, 26 La. Ann. 326; *Johnson v. Alexander*, 125 Ind. 575. In *Temptine v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31, it was decided that a policy taken out by a husband on his own life, payable to his wife, "her heirs, executors, or assigns," the insured paying the premiums out of his own funds, and the policy expressly providing that after the expiration of fifteen years, on surrender of the policy, none of its conditions having been violated, the company should pay to the insured, "his heirs, executors, or assigns," the equitable value of the policy, "as an endowment in cash," contains such a reservation for the beneficial use of the insured as to render the policy void, and fraudulent as against his creditors.

CRUTCHER v. MUIR.

[90 KENTUCKY, 142.]

DEED INTENDED AS A MORTGAGE — STATUTE OF FRAUDS. — A verbal agreement, by which the grantee in a deed is to reconvey the land to the grantor upon payment by the latter of indebtedness to the former, is a contract for the sale of lands, and void as being within the statute of frauds. Parol evidence is inadmissible, in the absence of an allegation of fraud or mistake, to show that a deed absolute on its face was intended merely as a mortgage.

B. A. Crutcher and R. F. Peak, for the appellant.

Bronaugh and Bronaugh, for the appellee.

LEWIS, J. In 1877, appellant made an assignment for benefit of creditors to Young, who, in February, 1878, conveyed the lot of land in controversy to Samuel Muir, in consideration of two thousand dollars, appellant and wife uniting in the deed, which contained a clause of special warranty only. Title of the lot was, previous to the assignment, in one Smith, to whom appellant had conveyed, reserving, in writing, right to redeem upon payment of a debt he owed, and part of the purchase-money received of Muir was, according to a previous agreement for conveyance of the lot by Smith to Young, used to discharge that debt, the residue being applied to pay other creditors of appellant. This action was brought by appellant, in December, 1886, against the executor and devisees of Samuel Muir, to enforce an alleged verbal contract for redemption of the lot, and for reconveyance upon payment of the two thousand dollars, and balance of another debt of five hundred

dollars, which had been partly paid by Young as assignee. It is not alleged the whole amount of the two debts had, when the action was commenced, been paid, but appellant stated in his petition an offer to pay what was still due.

It is, in our opinion, sufficiently proved there was, before conveyance of the lot to Muir, a verbal agreement made between him and appellant, whereby he was to reconvey whenever the two debts were paid off, by rents of the property or otherwise. Several witnesses, including Young, testify, substantially or directly, it was made; and besides, the property, instead of being exposed to public sale by the assignees, was, with knowledge and consent of appellant, sold at less than what the witnesses testify was at the time its actual value. It is, however, proper to say, Muir, after receiving title and possession, paid to the wife of a former owner of the lot several hundred dollars for relinquishment of her dower; but that fact though it may have been considered at time of sale, is not sufficient to countervail the evidence mentioned.

The agreement thus alleged and proved would, if in writing, unquestionably have the effect to change operation of the deed in question, though absolute in terms, into a mortgage; and if now treated otherwise, it is because it comes within section 1 of chapter 22 of the General Statutes, which provides that no action shall be brought to charge any person upon any contract for sale of real estate, unless the contract or agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith. There is a marked distinction between a legal title to real estate acquired under circumstances that make a trust upon the holder in favor of a person other than the immediate grantor, and that conveyed by an absolute deed from the vendor to purchaser.

An action for equitable relief may be brought and maintained in the first-mentioned case without either charging a person "upon a contract for sale of real estate," or contradicting or varying the terms of a deed under which the legal title is held, though the result may be to change a conveyance absolute on its face into a mortgage or deed of trust, or divest the holder of title altogether. Consequently, an agreement upon which claim for relief is in such case founded may, though not in writing, exist, and be enforced without violation of the statute referred to, and be established by parol, notwithstanding the general rule of evidence mentioned.

The case of *Williams v. Williams*, 8 Bush, 241, was where

the legal title to land was acquired by the holder by purchasing at execution sales, under a verbal agreement between him and the owner of the land that it should be held as security for money advanced, and that the latter should have the right to redeem. There it was held the agreement, though not in writing, could be proved by parol, and enforced so far as to require the holder of the legal title, upon payment of the money for which it was held as security, to reconvey the land to the original owner.

The doctrine then recognized and applied was in accordance with the previous cases of *Martin v. Martin*, 16 B. Mon. 8, and others cited, where equitable relief was upon similar grounds sought and granted. On the other hand, in the case of *Thomas v. McCormack*, 9 Dana, 108, referred to with approval in *Williams v. Williams*, 8 Bush, 241, the only question was, whether a conveyance by McCormack to Thomas of a lot of land, absolute on its face, should, on the facts there presented, be deemed, nevertheless, a mortgage, and this language was used: "There being no written memorial of any condition or defeasance, neither the public interest nor the established principles of equitable jurisprudence will allow a court of either equity or law to admit parol testimony in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation and some proof of fraud or mistake in the execution of the conveyance, or of some vice in the consideration."

The case of *Harper v. Harper*, 5 Bush, 176, was where the vendor, debtor, sought to enforce an alleged parol agreement, whereby the vendee, creditor, agreed to reconvey the land upon payment of the consideration of the conveyance, which was absolute in its terms. But it was expressly held no trust was created, and the parol conditional agreement was within the express prohibition of the statute referred to, and the case of *Thomas v. McCormack*, 9 Dana, 108, was cited and followed.

Appellant in this case, though not holding at the time the legal title, which was in Young, assignee, did have the beneficial interest in the lot, and, becoming a party to the deed to Muir, occupies substantially the attitude of vendor, and consequently cannot be now permitted to set up a parol agreement, made at the same time, that contradicts and essentially varies the terms of the deed that without condition or reservation passed the absolute title. And as the agreement is denied by

appellee, and no fraud or mistake in the execution of the deed is alleged or proved, the relief sought must be denied.

Judgment affirmed.

VENDOR AND PURCHASER — STATUTE OF FRAUDS — ORAL AGREEMENT TO RECONVEY. — An oral agreement by the vendee of lands to reconvey is within the statute of frauds: *Akrend v. Odiorne*, 118 Mass. 281; 19 Am. Rep. 449.

EVIDENCE — PAROL, ADMISSIBLE TO SHOW DEED ABSOLUTE INTENDED AS MORTGAGE. — A deed absolute in its terms may be shown by parol evidence to have been given only as security for the payment of money, and to have been intended, as between the parties, to operate only as a mortgage: *Tower v. Felt*, 26 Neb. 706; 18 Am. St. Rep. 795; note to *Mannix v. Purcell*, 15 Am. St. Rep. 584; *Lewis v. Bayliss*, 90 Tenn. 280; *Thomas v. Supervisors*, 67 Miss. 754; *Swegle v. Belle*, 20 Or. 323; *Cobb v. Day*, 106 Mo. 278; *Gilchrist v. Bewick*, 33 W. Va. 168; *Barry v. Colville*, 129 N. Y. 302. See also extended note to *Thompson v. Patton*, 15 Am. Dec. 47. A conveyance, in equity, may be controlled by oral evidence showing that it was given and received merely as security for a debt: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295. In a court of law, the rule seems to be that such evidence is not admissible: *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802; *Reading v. Weston*, 8 Conn. 117; 20 Am. Dec. 97, and note.

DANT v. HEAD.

[90 KENTUCKY, 255.]

ACTION — JUDGMENT FOR DEBT FALLING DUE PENDENTE LITE. — One who has a lien for a debt due and also for a debt not yet due, and who states both debts in his petition, may, upon a mere suggestion of record that the debt not due when the suit was begun has become due *pendente lite*, have judgment for both debts; but this rule does not extend to a debt not secured by a lien.

STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR, WHEN WITHIN. — A parol agreement not to be performed by either party within one year is within the statute of frauds and void; but if it is to be or has been performed by one or either of them within such period, it is not within the statute.

STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR — CONSTRUCTION. — A deed conveying a leasehold interest in a distillery, and reciting the transfer of the trade-mark used at such distillery, in consideration of one hundred dollars per year during eight unexpired years of the lease, is not a contract as to the trade-mark, within the statute of frauds, because it is not to be performed within one year, and the purchaser, after making one payment, cannot resist the second on that ground.

SALES. — A TRADE-MARK affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment.

TRADE-MARK — PURCHASE OF, INDUCED BY FRAUDULENT REPRESENTATIONS. — In an action to recover the purchase price of a whisky trade-mark, the fact that the seller, by the manufacture of a large lot of inferior

whisky, impaired the value of the brand, and, fraudulently concealing this fact from the purchaser, misrepresented the brand to be of good repute, thus inducing the purchase, is a good defense, if properly averred.

Rowntree and Lisle, for the appellant.

Harrison and Belden, for the appellee.

LEWIS, C. J. September 12, 1881, appellee, in consideration of four thousand dollars, sold and conveyed to appellant his interest in a tract of land leased jointly with B. F. Bryant from R. C. O'Bryan for ten years, beginning June 1, 1879, upon which was a distillery.

The deed, in addition to the contract for sale of the realty, contained the following: "It is hereby covenanted and agreed that said F. M. Head, party of the first part, for and in consideration of one hundred dollars per annum, payable at the end of each year during the time of the present lease from R. C. O'Bryan, which is eight years from June 30, 1881, se's conveys, and confirms unto said J. B. Dant, his heirs, executors, and assigns, all his right, title, and interest in or to a certain distiller's brand, known to the trade as 'F. M. Head & Co.' To have and to hold all and singular the above-mentioned premises, together with all and singular the appurtenances," etc.

November 28, 1883, appellee instituted this action for judgment on the second installment of purchase price of the brand mentioned, which became due September 12, 1883, the first having been paid, and judgment also upon the remaining six installments, to take effect as they respectively become due. The judgment rendered was for recovery of the second installment, together with interest, and that defendant be required to show cause by the next term of court why he should not be adjudged to pay these other installments, which the plaintiff suggested to the court had then become due and remained unpaid. Power to enforce payment of the other installments from time to time was reserved.

Section 185 of the Civil Code provides: "A party may be allowed, on motion, to file a supplemental pleading alleging material facts occurring after the filing of the former pleading; but if a plaintiff, having a lien for a debt due and a debt not due upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due *pendente lite*, have judgment for a sale of the property therefor."

A plaintiff may, under that section, by supplemental pleading, allege another or other notes of the same series, and given for the same consideration as the one sued on, have become due during pendency of the action, and have judgment therefor. But it does not seem to us a mere suggestion on record of such fact was intended to authorize judgment on a note not due when the action was commenced, except when a lien on property to secure it exists. It thus results, the only judgment appellee was entitled to as the record stands, if any at all, was for amount and interest of the installment sued on.

The main defense set up in the answer, to which a general demurrer was sustained, is, that the agreement sued on is not enforceable, because within operation of section 1 of chapter 22 of the General Statutes, as follows: "No action shall be brought to charge any person upon any agreement which is not to be performed within one year from the making thereof, unless agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in writing; it may be proved when necessary, or disproved by parol or other evidence."

It was definitely settled by this court, as early as *Roberts v. Tennell*, 3 T. B. Mon. 247, that a parol agreement to pay money, though not to be done within a year, is not void if the consideration be legal. In that case a distress-warrant for rent, payable in two years, was issued, and the court said: "On a verbal lease for more than a year no action will lie; but as the statute has not declared the lien void, any use may be made of the lease by either party, except that of maintaining an action upon it. The lessee, therefore, in case he enters in virtue of the lease, may use it for the purpose of showing he is no trespasser; and after he has enjoyed the leased premises for a term, he will be liable for the rent, not upon the express contract, but upon the contract implied by law from his use and occupation of the premises; and in such an action either party, we apprehend, may avail himself of the express contract to show the amount of rent to be recovered."

In the same case it was held an action cannot be maintained upon an agreement the borrower shall repay at the end of two years money loaned, because, by the terms of the agreement, it is not to be performed within a year from the making thereof. But it was said: "To give the statute the effect of making the contract void, and thereby utterly pre-

venting the lender from recovering the money lent, or if he be allowed to recover the money upon the implied contract resulting from the loan, to give to the statute the effect of not permitting the borrower to prevent the recovery of the money lent before it is due, or of a higher rate of interest than is due by the terms of the contract, would be extending the operation of the statute beyond its letter, and instead of making the statute the means of preventing frauds, it would be converting it into an instrument of fraud and injustice. It most certainly could not be said to be demanded by the reason and spirit of the statute."

In *Berry v. Graddy*, 1 Met. (Ky.) 558, by a verbal agreement, Belt, the decedent, induced appellee, who had married his niece, to abandon his determination to remove from the state, and incur expense of purchasing a farm, by verbally agreeing to pay a certain amount of the price in three annual installments. Graddy was to, and did, perform his part of the agreement within a year, and his right as administrator to credit for the amount was held to be unquestionable, according to the doctrine settled in *Roberts v. Tennell*, 8 T. B. Mon-247. But although it was then said to have been decided in England and some of the American courts that in such case the statute of frauds does not apply, and an action will lie for non-performance of the agreement by the other party, it was not deemed necessary to decide whether or not the doctrine could be sustained on principle, the right of Graddy to the amount claimed being placed on the common-law right of retainer for the debt due under the verbal contract.

In *Montague v. Garnett*, 3 Bush, 298, it was held there was a distinction between contracts executed in part or whole, and one wholly to be executed by both parties; but the right of the plaintiff to recover for the pork and corn loaned to the defendant was based alone upon the implied contract to return or pay for the articles, simply because the agreement was not to be performed within a year, although the statute was then said to have been "never designed to enable one man to get property of another by virtue of a parol contract, and then refuse to either execute the contract or return the property."

It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not to one which is to be or has been performed by one or either of them within such period, and that construction has been adopted elsewhere:

Atchison etc. R. R. Co. v. English, 38 Kan. 110; *McClellan v. Sanford*, 26 Wis. 595; *Curtis v. Sage*, 35 Ill. 22; *Berry v. Doremus*, 30 N. J. L. 403; *Haugh v. Blythe*, 20 Ind. 24; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Blanding v. Sargent*, 33 N. H. 239; 66 Am. Dec. 720. For if the practical effect and operation of the statute is, as has been uniformly held by this court, in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning and import of the language used. In fact, the statute properly applies to agreements that are wholly executory; and one which has been performed by one of the parties within a year is, to that extent, executed, and cannot, with propriety, be called an agreement to be performed within a year. In this case, the agreement is set out in the deed which was accepted by the appellant, and recorded. The distiller's brand, which is the consideration for the amount he agreed to pay, was received, used, and is still his property, and to permit him to evade payment under cover of the statute would serve to pervert the purpose of it without any reason. The defense that the distiller's brand was not a subject of sale and transfer, and therefore formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid; for it is well-settled that a trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment. But it is stated in the answer that appellee fraudulently represented the distiller's brand to be of good repute, and it was purchased by appellant upon faith of that representation, although appellee had, by the manufacture of a large quantity of inferior whisky, impaired and destroyed the value of the brand, which fact he fraudulently concealed from appellant.

It seems to us that allegation, if true, constitutes a defense, and it was error to sustain the demurrer to the answer, and the judgment must be reversed for further proceedings consistent with this opinion.

STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED IN A YEAR, WHEN WITHIN. — The provision of the statute of frauds respecting contracts not to be performed within a year applies only to those not to be performed on either side: *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267, and note; *Houghton v. Houghton*, 14 Ind. 505; 77 Am. Dec. 69, and note. The fact

that an agreement may not be, and was not expected to be, performed within a year does not bring it within the statute of frauds, if it is one that admits of a valid execution within that time: *Warren etc. Mfg. Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788, and note. See extended note to *Doyle v. Dixon*, 93 Am. Dec. 85. The contract having been fully executed, the statute of frauds does not apply: *Rhode v. Tuten*, 34 S. C. 496; and the same rule applies where it has been fully performed on one side: *Grace v. Lynch*, 80 Wis. 166.

TRADE-MARKS AS THE SUBJECT OF SALE. — A trade-mark becomes a part of the assets of the firm by which it was used and established, and can be owned, transferred, or sold like any other species of property: *Caswell v. Hasard*, 121 N. Y. 484; 18 Am. St. Rep. 833, and note. The name or initials of the owner of a business, when used as a trade-mark, may be included in a sale of the business, so far, at least, as to prevent the vendor from afterwards using them in a like manner on similar products, to the injury of the vendee: *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485, and extended note. ●

DUFOUR v. STACEY.

[90 KENTUCKY, 288.]

CONSTITUTIONAL LAW — FERRY FRANCHISE — VESTED RIGHTS IN. — The grant of a ferry franchise creates a vested property right, alienable and descendible, of which the state has no power by statute retroactive in its operation to divest the grantee or his vendee, or prevent the full enjoyment of it by either, for the sole cause that he is a non-resident of the state.

W. P. D. Bush and H. M. Winslow, for the appellant.

George C. Drane and H. Cox, for the appellee.

LEWIS, C. J. In 1848, by an order of the Carroll county court, a ferry was established across the Ohio River from the town of Ghent to the Indiana shore, and the ferry right was granted to J. F. Dufour, at the time owner of land where site of the ferry was. In 1850, he conveyed to his wife, Polly Dufour, the land and ferry right during her life, remainder to his sons, including appellant, Julius Dufour. In 1853, Polly Dufour filed the bond required by statute in such cases, which was approved by the court, and she continued to use and enjoy the ferry right, but executed no other bond until 1863, when she tendered one to the county court, which was not, however, accepted, nor any action taken by the county court in regard to it previous to 1868. At the last-named date, the county court overruled her motion then made to file a bond, made an order revoking the grant of the ferry right to her, and

another order granting the same ferry right to the trustees of the town of Ghent.

An appeal from each of the orders was taken to the Carroll circuit court, where judgment was rendered reversing the order establishing the ferry upon motion of and granting the ferry right to trustees of Ghent, and directing the county court to take the bond tendered by appellant, and continue the ferry in her name. In 1877, Julius Dufour purchased and became owner of the land and ferry right, executed the required bond, and continued to operate the ferry until April, 1888, when a rule was awarded against him by the county court to show cause why he should not sell the ferry right to a citizen resident of this commonwealth, or forfeit the same; and the trustees of Ghent being subsequently made parties plaintiff in the proceeding, a judgment of court was rendered overruling the response made by the defendant, and revoking the "ferry franchise granted in 1843 to John F. Dufour, and renewed and continued, in 1877, to and in the name of Julius Dufour." From that judgment an appeal was taken to the Carroll circuit court, where judgment was rendered affirming "the judgment and order of the Carroll county court forfeiting the ferry franchise claimed to be owned by the defendant, Dufour."

The authority upon which the order of the county court was made is found in subsection 3, section 9, chapter 42, General Statutes, as follows: "A non-resident owner of a ferry right shall sell the same to a resident citizen of this state within a year after his removal or accrual of his right, with leave of the court, and the purchaser give such new covenant. Upon failure to comply with any requisition of this subsection, the court shall revoke the grant," etc.

It appears appellant was not, when this proceeding was begun, nor had he ever been, a resident citizen of Kentucky, nor was either J. F. Dufour, original grantee, or Polly Dufour ever such resident citizens. As, then, appellant had failed to sell his ferry right within a year from accrual of it, the order of the county court revoking the grant cannot be regarded either premature or erroneous, if legislative power to divest him of the franchise, for the sole cause stated in the order, existed when that part of the statute quoted was enacted.

When the ferry was established in 1843, the statute did not make it a condition the owner of such franchise should be a resident citizen of this commonwealth, and consequently the grant to J. F. Dufour, though at the time a non-resident, was

valid and effectual. The only causes for which a ferry could, before the adoption of the Revised Statutes, be discontinued, which is equivalent to a revocation of the franchise, as held by this court in *McCauly v. Givens*, 1 Dana, 261, were: 1. A failure, for six months after establishment of a ferry, to provide "the necessary boats and ferry-men"; 2. The fact that the ferry shall have been for two years "wholly disused and unfrequented."

By subsection 5 of section 8 of the Revised Statutes, the same provision was made as the one in the General Statutes under consideration, except that it applied to non-resident owners of ferry rights thereafter granted. But there was not, by the terms of the order granting the ferry right to J. F. Dufour in 1843, nor did the statute then provide there should be, any limit as to duration of the franchise, as is now the case, and has been since adoption of the Revised Statutes. It therefore follows, if he acquired such an estate or interest in it as is alienable, the statute of 1873 cannot be regarded any more effectual to divest the appellant than such one passed before 1850 would have been to divest the original grantee.

In regard to ferry franchises, Kent, on page 459, volume 3, of his Commentaries, says: "The obligation between the government and owner of such franchise is mutual. He is obliged to provide and maintain facilities for accommodating the public at all times with prompt and convenient passage. The law, on the other hand, in consideration of this duty, provides him a recompense by means of an exclusive toll. An estate in such ferry and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant of a ferry that the government will not, directly or indirectly, interfere with it, so as to destroy or materially impair its value."

In *Trustees of Maysville v. Boon*, 2 J. J. Marsh. 225, this court thus defines a ferry franchise: "Nor can we admit conclusiveness of the argument that the grant of a ferry is always a personal privilege which ceases with death or alienation of the grantee. As no one can be a recipient of such grant on the Ohio except owner of land on the river, the grant to him is a franchise incident to and growing out of his title to the land. It is a hereditament which descends with the land to his heirs, and passes to his vendee by alienation of the right

to the land. It is, therefore, not like a tavern license, which is personal, but is like a right of way, or a right to a toll-bridge." And again, it was said in *Lytle v. Breckinridge*, 3 J. J. Marsh. 663: "The right to a ferry on the Ohio is a franchise incident to a freehold in the land. It passes with title to the land."

In *Carter v. Kalfus*, 6 Dana, 43, it was said a right to ferryage, like that to portage, is valuable property, and requires, on the Ohio River, large expenditures of money by the grantee of the franchise, and is founded on a valuable consideration. It is true, this court, in *Brown v. Given*, 4 J. J. Marsh. 28, said: "A ferry is a public highway, and is established more for the public good than for the individual advantage of the grantee." Nevertheless, that fact at the same time serves to show a ferry franchise is the subject of contract between the commonwealth and grantee, and that a valuable consideration passes from the latter to the former, whereby a property right becomes vested.

It seems to us as J. F. Dufour legally and regularly acquired, for a valuable consideration, title to the ferry franchise, which this court has held to be property alienable and descendible, that the legislature has no power by statute retroactive in its operation to divest his vendee, or prevent the full enjoyment of it by him, for the sole cause he is a non-resident of the state.

It is needless to refer to the particular clause of the constitution the statute contravenes, because, it being conceded, as is the case, that appellant has a vested interest in the land, and in the franchise as an incident of his title thereto, he can no more be deprived of it by a retroactive statute because he is a non-resident of this state than he could, in the same manner and for the same reason, be deprived of a right of way, or any other hereditament of a real nature. Whether the power exists to pass such statute applicable to ferries to be thereafter established is a question not now before us.

The judgment is reversed, and cause remanded, with directions to the circuit court to reverse the order of the Carroll county court, and remand the case for that order to be also set aside.

FRANCHISES — VESTED RIGHTS IN. — A ferry license, when granted, becomes the property of the grantee, and is a private right, subject only to governmental control, and when granted in an estate for years, does not terminate with the death of the grantee: *Lippencott v. Allander*, 27 Iowa, 460; 1 Am. Rep. 299. A ferry is an incorporeal hereditament acquired from the public either by some special act of the legislature or by the authority of some gen-

eral law: *Patrick v. Ruffners*, 2 Rob. (Va.) 209; 40 Am. Dec. 740, and note. The grant of a franchise to construct and maintain a street-railway has been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest degree: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; and see extended note thereto. The legislature can pass no act impairing the rights or privileges of a corporation without its consent: *Pingry v. Washburne*, 1 Aikens, 264; 15 Am. Dec. 676. As to the manner in which a franchise may be forfeited, see extended note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 198; also note to *Atchison etc. R'y Co. v. Noss*, 5 Am. St. Rep. 806, giving the reasons for which a franchise may be forfeited.

LOUISVILLE SOUTHERN RAILROAD Co. v. MINOGUE.

[90 KENTUCKY, 369.]

NEGLIGENCE — DEGREE OF, QUESTION FOR JURY. — When, in an action to recover for personal injury against a railroad company, the evidence is conflicting as to the question of negligence, it is for the jury to decide whether it is gross or ordinary.

DAMAGES — EXCESSIVE. — WHEN A VERDICT for damages, compensatory or punitive, or both, is for so large an amount that it can be accounted for only as the result of an improper sympathy or unreasonable prejudice, it will be set aside as excessive.

DAMAGES, WHEN EXCESSIVE. — When, in an action against a railroad company to recover for an injury received through its alleged gross negligence, the proof fails to show bad motive or purpose to injure, or a neglect so wanton as to demand the severest punishment, and it is utterly uncertain what the result of the injury will be, a verdict for ten thousand dollars will be deemed to be the result of prejudice or undue sympathy, and will be set aside as excessive.

RAILROAD COMPANIES — CARE DUE TO PASSENGERS. — Railroad companies, as to their passengers, are bound to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under like circumstances.

DAMAGES FOR FUTURE DISABILITY. — The future effect of an injury must be shown with reasonable certainty, to authorize a recovery of damages for a permanent injury. A mere conjecture, or even a probability, does not warrant the giving of damages for a future disability, which may never be realized.

Thomas W. Bullitt and L. C. Willis, for the appellant.

G. G. Gilbert, R. C. Davis, and Matt O'Doherty, for the appellees.

HOLT, C. J. A train of the appellant was delayed by the air-brakes failing to work. It was overtaken by a construction train of the company, which was known to those in charge of the passenger train to be but a few minutes behind it, and a collision occurred, the only damage to the passenger train

being the destruction of the rear platform of its rear car. The appellee Mary J. Minogue, who was a passenger upon it, was, by the jar of the collision, thrown from her seat to the floor of the car in which she was riding, and for the injuries she thereby sustained she brought this action for damages, averring that they resulted from the gross neglect of the appellant's agents who were operating the trains. It is claimed this neglect consisted in failing to exercise care in flagging the coming train.

The evidence is somewhat conflicting as to whether this was done in time to have enabled it to stop before overtaking the passenger train; but whether the fault lay in neglect in this respect, or in the rear train, if it had sufficient notice to enable it to do so, failing to check up, need not be considered, because, whether the one or the other, the testimony is of such a character as authorized the question of the existence or non-existence of gross neglect upon the part of the company's agents to be submitted to the jury.

They returned a verdict for ten thousand dollars. It is urged that this verdict is, in view of the evidence, so excessive that conceding it embraces both compensatory and punitive damages, yet this court should reverse the judgment. The existence of ordinary neglect in such a case authorizes compensatory damages, while gross neglect permits the jury to award those which are both compensatory and punitive. In this instance, the jury, if they thought proper, were authorized by the instructions to find both. Whether they have gone beyond a reasonable limit must be determined by the conduct of the company's agents connected with the accident, and the character of the appellee's injuries. While the rule for the measurement of compensatory damages leaves the matter largely to the discretion of the jury, yet the finding must be within the confines of reason. So, too, must exemplary damages be reasonably adequate to the degree of fault.

The appellee sustained external bruises, and her nervous system was greatly shocked. There is evidence tending to show, however, that it had been somewhat impaired by previous events. Immediately after the accident, she walked to a friend's house near by, and soon after rode home in a vehicle, a distance of several miles. She was confined to her bed for seven or eight weeks, and suffered from nervousness and sleeplessness. Since she left her bed she has walked about her room, and been to town once or twice, but has been unable to do any work. The accident occurred in October; the

case was tried in March following, and this, briefly stated, was her condition during that period. None of her bones were broken, but at one time since the accident, if not ever since, she has been troubled with partial paralysis, or an insensibility in one leg from the knee down.

The probable duration of her injuries is not shown by the testimony. Whether they are of a permanent character does not appear. The medical testimony which was introduced is utterly unsatisfactory in this respect. The burden rested upon the appellee to show the extent of her injuries. If of a permanent character, she should have shown it. A perusal of the evidence creates no satisfactory opinion upon this point, and leaves the matter in entire doubt. The physicians who testified say she may recover entirely, and she may not.

It is impossible to measure with anything like absolute certainty the amount of punitive damages proper in a case, or the extent of some of the elements of those which are compensatory. The opinion of a jury has been, and properly no doubt, regarded as the best means of even a fair approximation, and every verdict should be treated *prima facie* as the result of honest judgment upon their part. They are the constitutional triers of the facts of a case, and courts should exercise great caution in interfering with their verdicts. Litigants must not be left, however, to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy or unreasonable prejudice. In such cases it is one of the highest duties of a court to interfere; otherwise great wrongs will often result, and the party be remediless. Whether it should do so is more easily determinable in a case where compensatory damages only are allowable, because they, in part, admit of exact measurement. In such cases this court has often reversed the jury's finding. We see no reason why it should not do so in a case like this one, but with increased caution perhaps.

In the case now presented there was no intentional injury. An effort was made to flag the coming train, and those in charge of it attempted, upon notice of the danger, to stop it. Whether these efforts were of such a character as left the company open to the charge of gross neglect was a question for the jury; but no purpose to injure is shown; and while it was properly a question for the determination of the jury whether the company's agents had not been guilty of such neglect as

merited punishment by way of punitive damages, yet, in our opinion, a case was not presented by the evidence for a verdict of ten thousand dollars, either upon the score of punishment or compensation, or both. It is true that railroad companies, as to their passengers, should be held to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under the like circumstances, and in the conduct of a business so hazardous as railroading; but in the absence of bad motive or purpose of injury, or a neglect so wanton as to demand the severest punishment, and where it is utterly uncertain what the result of an injury will be, a verdict for such a sum as has been awarded to the appellee strikes one at first blush as the result of either prejudice toward the offending party or an undue sympathy for the one injured.

While absolute certainty as to the result of an injury should not be required, yet a mere conjecture, or even a probability, does not warrant the giving of damages for future disability, which may never be realized. The future effect of the injury should be shown with reasonable certainty, to authorize damages upon the score of permanent injury. This was not done in this case. The evidence shows that the appellee is as likely to entirely recover, and perhaps in a short period of time, as she is to be permanently affected by the injury.

To sustain a verdict like this one, under such circumstances, would often result in the grossest injustice, and its existence can be accounted for only upon the ground that the jury were swayed by prejudice or an improper controlling sympathy.

The judgment is therefore reversed, and cause remanded for a new trial consistent with this opinion.

DAMAGES, EXCESSIVE — VERDICT FOR, WHEN SET ASIDE. — A verdict for damages will not be disturbed because excessive, unless the amount is so obviously disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool, dispassionate discretion of the jury: *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 510; *ante*, p. 143, and note. Though verdict for damages may seem large, yet if it is sustained by ample evidence, it will not be disturbed: *Fort Worth etc. R'y Co. v. Wallace*, 74 Tex. 582.

DAMAGES FOR FUTURE DISABILITY. — In an action to recover damages for personal injuries of a permanent nature, physical and mental pain which the person injured is reasonably certain to suffer in the future may be recovered for: *Heddles v. Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am. St. Rep. 106, and note. The future effect of injuries, rendering one less capable of attending to his business, should be taken into account in estimating damages for personal injuries: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175, and note;

Johnson v. Northern Pac. R'y Co., 47 Minn. 430; *Fisher v. Jansen*, 128 Ill. 549; *Richmond etc. R. R. Co. v. Allison*, 86 Ga. 145. In such an action, the court properly charged the jury: "To entitle plaintiff to recover for future damages, there must be a reasonable certainty as to such future damage; a mere probability of its occurrence is not enough": *Missouri Pac. R'y Co. v. Mitchell*, 75 Tex. 78. See also *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and note.

RAILROADS — CARRIERS OF PASSENGERS — DEGREE OF SKILL REQUIRED. — The care exacted of a railway towards passengers is the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under the circumstances: *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781; *Texas etc. R'y Co. v. Miller*, 79 Tex. 78; 23 Am. St. Rep. 308, and note; extended note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490; note to *Louisville etc. R'y Co. v. Snyder*, 10 Am. St. Rep. 64; *Montgomery etc. R'y Co. v. Mallette*, 92 Ala. 209; *Arkansas etc. R'y Co. v. Canman*, 52 Ark. 517. A railroad is bound to exercise the highest degree of care practicable to secure the safety of its passengers: *Southern Kansas R'y Co. v. Walsh*, 45 Kan. 654.

COMMONWEALTH v. MAKIBBEN.

[90 KENTUCKY, 384.]

TAXATION — EXEMPTION FROM, FOR PUBLIC SERVICES. — An exemption from taxation in consideration of public services, to be constitutional, must be made in consideration of services rendered or to be thereafter rendered, and they must be expressed in the act making the exemption, or in the act to which that act is an amendment.

TAXATION — EXEMPTION — PROPERTY OF MUNICIPAL CORPORATION. — The property of a municipal corporation not necessary to the exercise of its municipal governmental functions must be treated as private property which cannot be exempted from state taxation except in consideration of public services.

TAXATION — EXEMPTIONS. — WATER-WORKS OF MUNICIPAL CORPORATION, constructed and operated for the convenience and profit of its citizens, and not necessary to the exercise of its municipal governmental functions, cannot be exempted from state taxation.

Jesse Arthur and Edward W. Hines, for the appellant.

Charles J. Helm, for the appellee.

BENNETT, J. This was a proceeding under the auditor's agent act to have the water-works belonging to the city of Newport taxed by the county court for state purposes. The county court refused to have said water-works listed for taxation for state purposes, upon the ground that, by an amended act of the legislature of this state, said property was exempted from "state or county taxes as long as the same remained unproductive"; and as the same was not productive at the time

the request was made and acted on, said property was exempt from state taxation. The case is here on *mandamus* to compel the judge of said court to list said property for taxation.

If the amended act exempting said property from taxation is unconstitutional, the court ought to have listed said property for state taxation. So the question is, Had the legislature the constitutional power to exempt said property from taxation?

Upon that subject the first section of our bill of rights declares "that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services."

It is not contended that the act authorizing the building and operating of said water-works required any "public service" to be rendered to the state. It is equally clear that the amended act exempting said property from taxation did not require any public service to be rendered the state in consideration of such exemption. It is equally clear, as matter of law, that the exemption, to be constitutional, must be made in consideration of public services rendered or to be thereafter rendered, and such services must be expressed in the act making the exemption, or in the act to which the act making the exemption is an amendment. Therefore, as none of the acts appertaining to said water-works required the appellee to render any public services to the state in consideration of the water-works property being exempted from state taxation, it is clear that if the appellee stands on the same footing as an individual, the act exempting said property from taxation is unconstitutional. So the question is, Was the power granted to the appellee to construct and operate said water-works granted to it as necessary to carrying on its municipal government as a political power, or simply as a private corporation for the convenience or profit of its citizens?

If the former, the exemption is constitutional; if the latter, it is not. But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property necessary to carrying on its municipal government as a political power is not subject to state taxation; but if it is not necessary for such purpose, then it must be treated as the property of a private corporation, and is subject to state taxation, unless it is expressly exempted in consideration of public services.

The case of *City of Louisville v. Commonwealth*, 1 Duvall, 298, 85 Am. Dec. 624, aptly illustrates the foregoing views. In that case it is said: "And if . . . the public property of the state and counties is exempt, the same reason exempts the public property of Louisville used for carrying on its municipal government. But so far as any of its [the city's] property may be used, not for that purpose, but only for the convenience or profit of its citizens, individually or collectively, this it owns and uses as a private corporation, and, like the property of all such corporations not expressly exempted [in consideration of public services, of course], it is a legal subject of assessment for taxation." Now, are appellee's water-works necessary for carrying on its municipal government as a political power? or are they an enterprise entered into by the appellee for the convenience or profit of its citizens? If the latter, it cannot be constitutionally exempted from state taxation, except in consideration of public services. We do not entertain a doubt that it is the latter.

The following extract from *Bailey v. Mayor of New York*, 8 Hill, 581, 38 Am. Dec. 669, deciding that the city, in erecting water-works, acted in its private, not public, character, is correct law: "The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. The whole investment, under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the lands and houses belonging to it situate within its corporate limits. The argument of defendants' counsel confounds the powers in question with those belonging to defendants in their character as a municipal or public body, such as are granted exclusively for public purposes of counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of those public corporations, thus blending, in a measure, those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as

to distribute the responsibilities attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purposes of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

It is clear that the appellee, in building and operating said works, acted in its capacity of a private corporation, and as it was not required to render public service in consideration of the exemption of said works from state taxation, the exemption is unconstitutional and void.

In *Barbour v. Louisville Board of Trade*, 82 Ky. 649, Judge Hines announces the correct doctrine on this subject in the following strong and comprehensive language: "The power of taxation grows out of the necessity to preserve the government by laying the common burden upon every citizen enjoying its protection of life, liberty, and property, and is limited in its nature to objects that are public as distinguished from those that are personal or private in their character. Taxation immediately for the benefit of an individual is a contradiction in terms," which is prohibited by the fundamental law, unless it is granted as a "public privilege" in consideration of "public services." If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise not a public service, there can be no doubt that such an act would be unhesitatingly declared unconstitutional, and to exempt a person's property from taxation in consideration of the same service would be equally unconstitutional. To exempt a person's property from taxation is to increase the burden of taxation upon all other tax-payers. The true test in such case is, Has the legislature the constitutional power to authorize the direct payment for the services? If not, she cannot exempt the person's property from taxation. There is no brief on file for the appellee.

The judgment of the circuit court is reversed, and the case

is remanded, with directions to grant the *mandamus* to compel the judge of the Campbell county court to list said property for taxation, etc. ·

IN THE CASE OF *Clark v. Louisville Water Company*, 90 Ky. 515, the real estate and improvements of the company were assessed at the value of two million two hundred and fifteen thousand dollars for state and county taxes for the year 1887. The taxes levied thereon being delinquent, the sheriff was about to sell certain property of the company, when he was enjoined from so doing, on the ground that the property was exempt from assessment and taxation. Its claim was based upon the following statute: "1. That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city of Louisville for fire protection free of charge. 2. The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville, therefore, the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, — state, municipal, and special." In the lower court the defendant moved that the temporary injunction be made perpetual. This motion was met by a counter-motion that the company be compelled by rule to pay the taxes into court, or, failing to do so, that its property be placed in the hands of a receiver until enough should be realized to pay them. The latter motion was overruled and the injunction made perpetual, the court holding that the property of the defendant could not be seized and sold, and that it was not liable for the taxes.

The constitution of Kentucky provides that property shall not be exempt from taxation, except in consideration of public services, and the plaintiff contended, — 1. That if the above act was passed on the idea of the rendition of public services, it was invalid, because the company rendered no such public service as is contemplated by the constitution; and 2. That this was not the reason for its enactment, and that it is therefore unconstitutional. In passing upon the questions involved, the court said: "We shall pass by the question whether the rendition of a local public service, as to furnish the city of Louisville with water, is a valid consideration for an exemption from state taxation, thereby imposing an additional burden upon all the balance of the people of the state, or whether it is a governmental duty of the state to furnish to a city water for fire protection and sanitary purposes free of charge, either by direct taxation upon all the people of the state, or indirectly by an exemption from taxation in favor of the one doing so; and if so, being, therefore, a valid consideration for such an exemption. This a question as to which there is a difference of opinion; and in view of the conclusion we have reached as to the second position taken by the appellant, it is unnecessary to consider it. We think it evident that the furnishing of water by the company to the city for fire protection free of charge was not what induced the passage of the act. According to the legislative recital, the sinking fund of the city owns the entire stock of the water company. There is nothing in the record showing otherwise, and it must therefore be assumed to be true. While the sinking fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities. We see, therefore, that the property and rights of the water company belong to the

city. While, therefore, the act recites that it shall be the duty of the water company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the water company, and it would therefore be but a payment to itself. It cannot be supposed, therefore, that the legislature intended to relinquish over ten thousand dollars of taxes annually in consideration that the city would not charge itself for water furnished by itself. It is useless to inquire why the act declared that the water company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking fund department and the city proper. The reason which induced the attempted granting of the exemption must therefore have been, as indeed the act recites, that the sinking fund of the city, or in other words the city itself, owned all the water company stock. It says: 'The sinking fund of the city of Louisville, being the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character,—state, municipal, and special.' We have, therefore, an express recital by the legislature of its reason for the attempted exemption, and that this was the true and only one is confirmed beyond question by the other recitals of the act. The question therefore is, Did the fact that the sinking fund, or in other words the city, owned the water company stock constitute a valid consideration for the exemption? A municipal corporation has a double character; in one it acts strictly in its governmental capacity; in the other, for the profit or convenience of its citizens. Considered in the latter light, it occupies the attitude of a private corporation merely, while in the former it is an arm of the state government, or a part of its political power. It is an *imperium in imperio*. The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation, but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely. While the sinking fund of the city of Louisville is a distinct corporation, yet it is owned by the city, and merely controls its funds. It discharges no governmental duties, and was created merely to make money for the city. It may invest the funds in stocks of any character, if they are likely to bring good returns, like any other private corporation. It will hardly be contended that if it were to invest surplus money in a private manufacturing company, that the legislature could constitutionally exempt that company from taxation. In short, the city, in its private, and not its governmental, character, owns the stock and property of the water company; and this ownership is not necessary to the execution of its duties as a political or governmental power. This being so, it stands upon the same footing as would any individual or body of persons if like privileges had been conferred upon them, and cannot be constitutionally exempted from state taxes, save in consideration of public services. The fact that the furnishing of the water may incidentally protect from fire the public buildings of the state will not support the exemption. The privilege was not conferred, as the legislature declared, and as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and

pecuniary advantage of the city, and in which the state at large had no interest": *Bailey v. New York*, 3 Hill, 539; 38 Am. Dec. 669.

"If it be said that the exemption should be upheld if it be in fact supported by any valid consideration, although the recited one be invalid, we reply that the real consideration, and the one which moved the parties to the transaction, is to be regarded. The one acted upon by the legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the water company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings does not aid the matter. The so-called contract was therefore void at its inception. Instead of being impaired or in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the privilege. A statute exempting one is certainly open to the objection of impolicy, if indeed it be not such unequal and partial legislation as is forbidden by law. The appellee, by this suit, came into court asking equitable relief by injunction or the exercise of an extraordinary remedy. Asking equity, it may well be required first to do equity; and being in court, and liable for the tax, and the chancellor being in possession of the case, while its property in use in its business could not be seized, it should have been required to pay the taxes into court; or failing to do so within a reasonable time, the management of it should have been intrusted to a receiver until enough was realized to pay them and the costs of the proceedings."

Mr. Justice Prior wrote a dissenting opinion, in which he maintained that under the above statute the stock of the defendant water company was exempt from taxation. After quoting that portion of the statute which makes it the duty of this company to furnish the water to the public fire-cisterns, and public fire-plugs or hydrants free of charge, he said: "If this water company, therefore, owned by the city, should refuse or fail to furnish this water, and a public building is destroyed by fire by reason of this neglect, it is evident that the company would be responsible for the loss. A public duty required to be performed, for which an action would lie for a failure to discharge it, and still it is insisted that the reason prompting the legislature to make the exemption was because the city of Louisville in fact owned the stock of the corporation. I have no doubt that such was the inducement; and why? Because the tax-payer had assumed heavy burdens to obtain the stock, and a portion of those burdens being used by the city for the protection of both public and private property, it was thought both equitable and proper that the exemption should be made. The city has assumed a duty that not only affords incidental protection, but by the express terms of the charter it is made obligatory on the city to discharge that duty; and in the very next section following the exaction of the duty is the recital that as the city owns the stock the water company is exempt from taxation. Where there is an exemption we look to the act to see if there is a public service to perform, and if none, the exemption must be held invalid. If there is such a consideration, the statute must stand, however impolitic the legislature may be. After the exaction of this duty and its full performance by the city, the collector of taxes, on behalf of the state levied, on the property of the water company for the state taxes, — levied the tax-writ upon property that the citizen had been taxed to purchase in order to supply an absolute want, that he is again taxed for as the water enters his dwelling, and required to

maintain, by taxation under the power of the municipal government, the existence of the water-works for the purpose of performing a public duty imposed by the act under consideration. It seems to me neither just nor equitable to consider the municipality as the owner of a private corporation when attempting to impose such taxation on the tax-payer, who is the real party to this action, and who receives nothing but the water he uses and drinks in the way of private gain. The legislature, viewing the question in this light, granted the exemption, and to make it binding on the state, at least so long as it stands unrepealed, required the performance of a public duty that the city has never failed to discharge. Why the state may not impose upon a municipality the performance of a service for the public good I am unable to perceive. It is but a subordinate agency of the state government. Here the entire expense of furnishing water is placed upon the tax-payers of the city, and this is proper, because they are the real beneficiaries; but the legislature, knowing the oppressive burdens that pertain to the administration of municipal government in the imposition of taxes, has attempted to aid the tax-payer by releasing the state taxes upon a consideration resulting in the public good, and for a failure to comply with or construe the consideration prompting the exemption, if loss should occur, a legal liability would at once arise, and to discharge which a resort to the tax-payer must be again had. There can be no constitutional inhibition to such legislation, and to assign another motive on the part of the legislature for the exemption than the consideration expressly stated in the act is no argument against its validity, or a sufficient reason for declaring the act of exemption unconstitutional and void. I am therefore unwilling to impose upon the tax-payer the sum of seventy-five thousand dollars in the way of back taxes, in the face of a legislative exemption standing unrepealed, based upon a sufficient consideration, and made with a view of affording that legislative aid to the tax-payer upon his performing a public service."

TAXES — EXEMPTION FROM. — The right of taxation is never presumed to be surrendered by the sovereign power, and such surrender is never made, unless it is the result of express terms or necessary inference: *Mayor v. Baltimore etc. R. R. Co.*, 6 Gill, 288; 48 Am. Dec. 531, and note. Exemption from taxation as a contract: See note to *Atwater v. Woodbridge*, 16 Am. Dec. 51. See also note to *Mott v. Pennsylvania R. R. Co.*, 72 Am. Dec. 682. All laws exempting from taxation are to be strictly construed, and all reasonable intendments indulged in favor of the state: *Montgomery v. Wyman*, 130 Ill. 17.

TAXATION — MUNICIPAL CORPORATIONS, PROPERTY OF, WHEN EXEMPT. — The express exceptions specified in the tax law of Kentucky do not imply that no property not excepted shall be exempt, or that municipal property used for governmental purposes was intended to be taxed. Property owned and used by the city of Louisville in its capacity as a private corporation for its own profit, such as market-houses, fire-engine houses, etc., is subject to taxation: *Louisville v. Commonwealth*, 1 Duvall, 295; 85 Am. Dec. 624. Land of a county used for county purposes is exempt from all taxation: *Worcester County v. Mayor*, 116 Mass. 193; 17 Am. Rep. 159, and note. The exemption indicated as "public property used for public uses" applies to property, the ownership of which is in the state or some of its municipal subdivisions: *St. Edward's College v. Morris*, 82 Tex. 1. School lands are exempt from taxation while held by the county: *Daugherty v. Thompson*, 71 Tex. 192; *Continental etc. Co. v. Board*, 80 Tex. 489. Property, the title to which is held by the United States, for whatever purpose, is exempt from taxation while so held: *People v. United States*, 93 Ill. 30; 34 Am. Rep. 155.

BLAND v. BLAND.

[90 KENTUCKY, 400.]

TRUST ESTATES — WHEN SUBJECT TO DEBTS OF CESTUI QUE TRUST. — Estates of every kind held in trust are subject to the debts of the persons for whose benefit they are held, although the instrument creating the trust may provide otherwise, unless the trustee is given a discretionary power to withhold all payment or benefit from the *cestui que trust*.

TRUST ESTATES UNDER WILL — WHEN SUBJECT TO DEBT OF CESTUI QUE TRUST. — When a will creating a trust estate provides for the payment of the profits thereof to the *cestui que trust*, unless his creditor shall attempt to subject them to the payment of his debt, in which event such profits shall be added to the principal, which the *cestui que trust* shall have absolute power to dispose of by will, the beneficiary under the trust takes such an interest in the property as may be subjected to the payment of his debts.

TRUST ESTATES — WHEN SUBJECT TO DEBTS OF BENEFICIARY. — A trust estate, or the profits thereof, created by will or otherwise, is subject to the debts of the beneficiary, unless the instrument creating the trust divests him of all interest in the property upon an attempt by his creditors to subject it to his debts.

TRUST ESTATE — HOW SUBJECTED TO PAYMENT OF BENEFICIARY'S DEBTS. — Where a will creates a trust estate, and gives the beneficiary the profits thereof, with power to dispose of the estate by will, and his creditor undertakes to subject the trust to the payment of a debt, the personalty should first be applied to its payment, and, if need be, rent out the realty for this purpose. If this will not satisfy the debt within a reasonable time, a sale of so much of the realty as may be necessary will be ordered.

J. P. Hobson, for the appellants.

William Lindsay, Bush and Robertson, and E. D. Walker, for the appellee.

HOLT, C. J. The administrator of Henry Bland, having obtained a judgment and a return of *nulla bona* against the appellees, E. U. and J. H. Bland, brought this action to subject to the payment of his debt property, or the profits thereof, which he claims is held in trust for them under the will of their sister, Maria Bland. The question is, whether, under its provisions, they own any estate or interest which can be subjected by suit to the payment of the debt. The will provides:—

“1. I bequeath and devise to the trustee hereinafter named all the property not otherwise disposed of that I may possess and own at my death, real, personal, and mixed, in trust, and for the following purposes:—

“It is my will, if it can be effectuated, that my brothers Evarts and James shall each annually (or at shorter periods,

in discretion of said trustee) receive from said trustee the rents, interest, dividends, and profits of my estate, each one half thereof. It is also my desire that their interest, and that of each alone, in the rents, etc., of my estate shall in no manner, directly or indirectly, be subject to the debts of my said brothers, or either of them, which now exist, or which they may hereafter create. And being advised that if the right of my said brothers, or either of them, in and to said rents, etc., is made absolute, certain, and indivisible, that their creditors, contrary to my wish and will, may possibly subject the said rents, dividends, etc., to their claims,—now, therefore, to meet this state of case, I declare the right of my said brothers to receive said rents, profits, etc., shall only accrue annually, and that the same shall be paid one half to each by my said trustee, for their own, their present or future, use, or for their voluntary disposition thereof; and if, by any legal proceedings against said trustee, or my said brothers, or either, the said rents, etc., shall be attempted to be subjected to the debts of my said brothers, or either, then the rents, interest, dividends, or profits for that of both, or of the one whose interest is sought to be subjected, shall be added to the fund referred to in the next item, and my said brothers shall receive no part thereof, or at least the one for whose debt it is sought to be subjected.

“2. It is my wish that the principal of my estate shall be so invested and kept invested as that it may produce a fair and reasonable profit and dividend. It is also my wish that so much of the profit, etc., of my estate as shall not under the preceding item be paid to my said brothers shall be treated thereafter as principal of my estate, to be invested in such way as to yield profit.

“3. If either of my said brothers Evarts or James shall die unmarried and childless, then the provisions of item 1 shall be for the benefit of the survivor during his life, but the one so dying first may, by will, devise one half the principal of my said estate to whom he soever desires, but such devise not to take effect until the death of the surviving brother, who meantime shall receive the entire profits, etc., subject to conditions of item 1, if creditors attempt to intervene, and the survivor, Evarts or James, may dispose of the other half of my estate then remaining, by will, as he desires. But if either or both of my said brothers (Evarts or James) shall die intestate, then the one half of my estate which he might have disposed of by will shall pass to his children, if any he has, or

if none, then to the children of his surviving brother jointly with my sister Lavinia, and brother Strother, or their heirs or devisees."

By subsequent clauses, it is provided that if Evarts and James, or either of them, at any time become free of debt, then one half the estate is to be conveyed absolutely to the one so free; and in the event both become free or die, the trust is to terminate; also, if the trusteeship should be vacant, the county court may, upon their motion, or that of the survivor, appoint a trustee; also, that the trustee may, with their consent or that of the survivor, make investments, or sell the property and reinvest the proceeds, but all to be held as principal of the estate; or instead of renting the real estate, the trustee may permit them to occupy it, or part thereof, a fair rent to be charged, and enforced as a lien upon the crop if their creditors attempt to subject it; also, that the trustee may make all necessary improvements or repairs with their consent or that of the survivor, and they may agree upon his compensation.

It is manifest the purpose of the testatrix was to give to these two brothers her estate without its being liable for their debts. The policy of our law, and in fact its express provision, forbids the creation of any trust by which this may be accomplished. Section 21, article 1, chapter 63, of the General Statutes says: "Estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof."

Accordingly, this court has always subjected property held in trust to the payment of the debts of the *cestui que trust*, unless a discretionary power was given to the trustee to withhold all payment or benefit from him. In such a case there exists no ownership by the *cestui que trust* in the use of the property. He has no beneficial interest. The ownership is in the trustee, with the power to give or not, as he may please. There exists no claim which the *cestui que trust* can enforce against the trustee, and therefore no right exists in the debtor which the creditor may, by substitution, enforce.

The will of Maria Bland, however, creates no such trust, but one is created in the profits of the estate, which the will provides shall be forfeited in case the creditors of the *cestui*

que trust attempt to subject them to the payment of their debts. This having been done by the institution of this suit, it is now claimed that *ipso facto* they have been divested of all interest in the estate. It is contended that the testatrix had a right to annex a condition to the bounty; that she had a right to say it should be defeasible in a certain event, and that this cannot be said to be in fraud of any creditor of the *cestui que trust*.

Trusts created by will are to be regarded according to the intention of the testator, unless it be contrary to law or public policy. He cannot so execute his will that a compliance with it will result in a violation of law. He cannot override the statute. The power to make the will comes from it. The statute, *supra*, however, only subjects trust estates of every description to the debts of the *cestui que trust*, and it is said that here, by the happening of the contingency named in the will which was to work a forfeiture, no trust exists. Conceding this to be true, yet it will be noticed the intended forfeiture relates alone to the profits of the estate; and in the event they do not go to the conditional *cestuis que trust*, they are to become a part of the principal of the estate.

The case is unlike that of *Marshall's Trustee v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467, because there the portion of the *cestui que trust* was given to him absolutely, but with discretion in the trustee, in whom the control or title was vested, to pay him such portions of the profits and in such manner as he might think best. This was but giving him a reasonable discretion in the matter, — one which he was bound to exercise in good faith, and the reasonable exercise of which a court would compel for the benefit of the beneficiary. In that case both the estate and the right to the profits belonged to the *cestui que trust*, the title and control being vested in the trustee. There was no question of forfeiture in the case, or of the existence or non-existence of an estate in the debtor, and it was properly subjected to the payment of his debts. The statute applied in that case.

It will not do to say that the intention of the testator must be executed without regard to the existing law. Suppose he were to give a fund in trust, and merely provide that it should not be liable for the debts of the *cestui que trust*. To subject it to them would violate the testator's intention, and yet no one will claim that it could not be done. The testator must, in making his will, conform to the existing law. Upon the

other hand, the case of *White v. Thomas*, 8 Bush, 661, relied upon by the other side, is not like this one. There the *cestui que trust* had no power to dispose of the estate. The property was devised to an executor in trust for a person, with permission to the executor of affording to another party the use or the value of the use of a part of it; and the creditor of the latter attempted to subject this use to the payment of his debt. The mere use was given, it to terminate if any sale should be attempted by the donee or any creditor.

In this case, however, the provision of the will relative to forfeiture relates merely to the profits of the estate, and it is provided that in the event of the happening of the condition of forfeiture, they are to become a part of the principal of the estate.

Undoubtedly, a testator is under no obligation to provide for the payment of the debts of the devisee. It is, of course, no fraud upon the creditors if he does not do so. He may condition his bounty as suits him, if he violates no rule of law. He may provide that it shall cease upon the bankruptcy of the donee, and go to another; also, that this shall take place upon the filing of a creditor's suit to subject the estate to the debt of the first donee: *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113. He cannot, however, substantially give the estate to the debtor, and at the same time place it beyond the reach of his creditors.

Here the testatrix gives to her two brothers the absolute power of disposing, by will, of the estate. It is not a mere power of disposition to some particular person, or for some particular purpose; but they may, by will, dispose of it in any way they desire. This unlimited power of disposal is utterly inconsistent with the idea that the party possessing it has no interest in the property. It is only in cases where the happening of the event has divested the devisee of all interest in the property that the courts have said there was nothing that could be reached by his creditors. As careful an examination as we have been able to make shows this to be the fact.

In this instance, by the happening of the event named in the will, the profits, instead of being paid to the *cestuis que trust*, became a part of the principal of the estate, with the power in them to dispose of it all, by will, as they please. It can hardly be said there was any forfeiture of the profits as to them; and while the case undoubtedly is of a character warranting discussion *pro et con*, yet, regarding all the provisions

of the will, the property is substantially that of E. U. and James H. Bland.

The testatrix desired to so provide that their creditors could not reach it. This she evidently attempted to do; but she also undoubtedly thought and intended that even after the happening of the event which would add the profits to the principal of the estate, and stop their payment by the trustee to her two brothers, they would still be the real beneficiaries of the estate. This being her intention, and this being the real effect of the will, the property is liable to their debts. The law regards the substance rather than the form; and persons disposing of their property by will cannot be permitted to really make a debtor the beneficiary of their bounty, and by evasion defeat the statute for the protection of the creditor.

The judgment sustaining the demurrer to the petition and dismissing the action is reversed, with directions to the lower court, in the event no valid defense is presented to the appellant's debt, to apply to its payment the personalty of the estate, and if need be, rent out the realty for this purpose; and if this will not satisfy it within a reasonable time, then a sale of so much of the realty as may be necessary will be ordered; and for all further necessary proceedings consistent with this opinion.

IN THE CASE OF *Bull v. Kentucky National Bank*, 90 Ky. 452, a testator named Bull devised certain specified property to his two sons, to be held in trust by his executor, and to be controlled by the latter during the lifetime of such sons, the executor to pay, in quarterly payments, the net proceeds of the rents and profits to the beneficiaries. The will also contained the following provision: "The said property shall not be, in any manner, encumbered by, nor shall it or its rents or profits be in any way anticipated by, or in any way subjected to, the debts of my son Edward, either by process of law or by any order, assignment, or contract he may make; and should it at any time be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or encumbered by him, then, in that event, I direct that my executor shall thenceforth pay the rents and profits of said property to the wife of said Edward for separate use, free from the debts or control of her said husband."

The son Edward executed his notes for a large amount, and the Kentucky National Bank discounted them for his benefit. After exhausting its remedy at law against him in seeking to recover on the notes, it sought relief in equity against the trust estate. It recovered judgment in the lower court, and the beneficiary appealed.

The appellate court decided, however, that Edward, by incurring indebtedness on the notes, thereby became divested of all interest in the trust estate, under the terms of the will, and consequently that only the income due at the time of the rendition of the opinion could be subjected to his debts. This

case is distinguished from the principal case of *Bland v. Bland*, 90 Ky. 400, ante, p. 390, on the ground that in the latter case the "devisee was never divested of his interest or deprived of his title, but was in fact given such an absolute estate as to exclude the idea that he was not in every sense a beneficiary. Here the use, and we might say the life estate, ceases in Edward and becomes vested in his wife; so there is no estate in Edward for either himself or his creditor, and as the deviser (his father) had the power to make such a limitation or create the defeasance when disposing of his own estate, neither Edward nor his creditor can complain. Equitable life estates, or a beneficial interest in the debtor, cannot escape subjection to the payment of his debts. But here he had no estate, because the devisee becomes divested by the very terms of the will, that neither misleads nor deceives the creditor, who is trusting the beneficiary in the business transaction."

The court further said: "When you take from the principal devisee the use or enjoyment of the income (and this is all he is entitled to), nothing remains of the estate for him. There is no estate left in Edward that a chancellor can reach, or to which Edward could assert any right after the happening of the event by which he is divested of title, and his wife becomes entitled to the rents and profits. It is argued that this is a mere evasion of the statute by which it is provided that 'estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use or for whose benefit they shall be respectively held or possessed,' etc., and that no such devise should receive the sanction of this court. That it was the purpose of the testator that his sons should use and enjoy the property devised to them unmolested by any creditor is apparent, but this affords no reason for disturbing the provisions of his will on this subject, if, by its terms, their equitable interest has passed to others. It is a mistaken idea to say that the devise gave to the sons an equitable life estate in this property, or in the rents and profits, as by the provisions of the will under which this title is passed to the sons they are to become divested of the title upon a certain contingency. The testator was not required to anticipate the extravagance of the beneficiaries of his bounty so as to provide for those who might thereafter become their creditors; but, on the contrary, the property devised belonging to him, he had the right, and it was his duty, to secure the sons, and particularly their families, against such a reckless use of their property as might reduce them to want. There is nothing in such a provision as affects a sound public policy or makes this devise of the testator superior to the law of the land. . . . A testator cannot vest the title in a trustee for the use of another and prevent its enjoyment by the *cestui que trust* without subjecting it to the debts of the latter. This is the rule in this state, and the doctrine recognized in this case is not inconsistent with it. While the trustee holds the property for the use of the debtor, he holds it subject to the claims of his creditors, but where the property or its profits is to be applied to the use of the beneficiary (the debtor) for a limited period, or until the happening of a certain event, when the title or the entire profits is to vest in another, then the right of the creditor to subject it for the debt of the first taker is gone."

The following authorities, and quotations therefrom, were given in support of the doctrine announced: "In *Brandon v. Robinson*, 18 Ves. 429, Lord Eldon said: 'There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate. If a condition is so expressed as to amount to a limi-

tation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.' This statement of the lord chancellor embraces the whole law in this class of cases.

"In the case of *Oldham v. Oldham*, reported in L. R. 3 Eq. 404, before the master of the rolls, the question was, whether Oldham had been divested of his life interest in an annuity by entering into a composition with creditors, the annuity to pass to the wife in the event he should anticipate or dispose of the fund, or should have a fiat in bankruptcy duly issued against him. He pledged this future income, and in a contest between the creditors of Oldham and the trustees it was adjudged that the stipulations of the trust should be executed, and that his life interest was gone.

"The case of *Shee v. Hale*, 13 Ves. 404, in chancery, John Mootham, by his will, bequeathed to his son, through trustees, an annuity of two hundred pounds during his life, with the condition that it was to fall into the residuum of the estate in the event his son should sell, assign, or part with the same as a security for money to be advanced, or should anticipate the same by pledging, etc., except only as to the then next annual quarterly payment. The son took the benefit of the insolvent act, and his assignees claiming the annuity, it was held that the assignees could not take the fund, but that it passed as directed by the will.

"The doctrine of the English courts is well settled on the point involved, and the courts of this country have followed it. In *Nichols v. Eaton*, 91 U. S. 716, the supreme court was not disposed to accept the doctrine, in so far as it restricted the power of testamentary disposition so as to prevent the beneficiary from using and enjoying the benefits of the devise against the claims of creditors. In that case, the bankruptcy of the devisee was, by the will, to terminate all his interest in the estate, and his creditors were denied the right to the estate or its profits after the act of bankruptcy. Where the debtor, who is the beneficiary, has any substantial right in the property that a chancellor can enforce, then, so long as this right continues, his interest is liable for his debts, but no longer. The event happening upon which the interest passes to another, the creditor is without remedy. Nor are we without precedent establishing the doctrine that the event upon which the beneficiary may be divested of title may be the decision of a chancellor subjecting the interest or income to the payment of the debts of the *cestui que trust*."

"In the case of *White v. Thomas's Trustee*, 8 Bush, 661, the will provided that the right of another to own the property devised should not be subject to alienation or sale, and that the right to the use should terminate upon an attempt to do so by the beneficiary or her creditors. This provision was upheld on the ground that Mrs. White had no interest in the property."

In *Bramhall v. Ferris*, 14 N. Y. 44, 67 Am. Dec. 113, it was decided that a provision in a will that the interest of the devisee should cease on the recovery of a judgment by creditors was valid.

For the reasons above given, the judgment of the lower court was reversed, that a judgment subjecting the income due at the date of the delivery of this opinion might be entered, after which all interest of the sons ceases in the profits and income of the property.

TRUSTS — LIABILITY OF TRUST ESTATES FOR DEBTS OF BENEFICIARY. — A discretion may be given to a trustee in the management and control of the trust estate, and as to the amount of profits to be paid therefrom, and the manner of paying them to the beneficiary, but the rights of the latter's creditors cannot be impaired, under the General Statutes of Kentucky, providing that trust estates shall be liable for the debts of the *cestui qui trust*, the same

as if he held the legal title: *Marshall v. Rash*, 87 Ky. 116; 12 Am. St. Rep. 467, and note. As to the validity of a trust providing that property shall go to a beneficiary, to the exclusion of his alienees and creditors, see *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398, and extended note 404. When a trust estate is set apart for the benefit of a beneficiary, by a will which declares that the profits of the property so set apart are for his use, but that neither the estate nor the profits shall be bound for his debts, past or future, other than for decent and comfortable support, and that at his death the property shall pass to another person, the beneficiary does not take any absolute property in the profits of the estate which he might have aliened, nor can such profits be reached by creditor's bill against him: *Garland v. Garland*, 87 Va. 758; 24 Am. St. Rep. 682, and extended note.

SIMRALL v. CITY OF COVINGTON.

[90 KENTUCKY, 444.]

MUNICIPAL CORPORATION — ORDINANCE TAXING INSURANCE AGENCIES. — A city having authority to license and tax all insurance agencies has power to compel each insurance agent to pay a separate tax for each company represented by him.

MUNICIPAL CORPORATIONS — ORDINANCES — VALIDITY OF. — A municipal ordinance enacted under a general grant of power or by virtue of incidental authority, if unfair and partial in its operation, will be declared void. Ordinances purporting to regulate callings, or otherwise, must preserve equality of right.

MUNICIPAL CORPORATIONS — ORDINANCE TAXING INSURANCE AGENTS — WHEN VOID FOR DISCRIMINATION. — A municipal ordinance imposing a tax upon agents of insurance companies not located within the city which is not imposed upon agents of companies located therein, and requiring the agent to pay a separate tax for each outside company represented by him, is void, as being an unjust and oppressive discrimination against agents of insurance companies not located within the city.

MUNICIPAL CORPORATIONS — ORDINANCE TAXING INSURANCE AGENTS — WHEN VOID FOR DISCRIMINATION. — An ordinance imposing a license upon agents of insurance companies not located in the city which is not imposed upon agents of companies located therein, and giving any resident of the city who has procured a license to transact business for such company not located therein the right to employ as many solicitors as he may desire, which right is not given to non-resident agents, is void, as an unjust discrimination against agents who are not residents of the city.

MUNICIPAL CORPORATIONS — ORDINANCE, WHEN VOID AS DISCRIMINATION. — A municipal ordinance which not only discriminates between residents of the city enacting it and those residing outside of it, whether within or without the state, but also places a burden upon some of its residents, while others engaged in similar business are exempt, is unreasonable and void, as partial legislation.

Tiedale and Gray, for the appellants.

W. A. Byrne, for the appellee.

HOLT, C. J. This appeal questions the validity of an ordinance of the city of Covington entitled "An ordinance to impose a license tax upon certain insurance agents and solicitors," and which provides:—

"Be it ordained by the city council of Covington that no person, unless he shall have procured a license therefor, shall transact any business as agent or solicit for any insurance company not located within the city of Covington, Kentucky; and such agent or solicitor shall procure a separate license for each insurance company for which he shall transact said business; provided, that any resident of said city who shall have procured a license to transact business for any such company may employ as many solicitors as he may desire to solicit and procure business for him for said company; and provided further, that when said business shall be conducted by several persons in partnership, a license to such persons in the name of the firm shall authorize each member of the firm to transact the business of the partnership, but the name of each member of the firm shall be specified in the license."

Other sections provide as to the license fees, and for the prosecution and punishment, by way of fine, of violators of the ordinance. The only provision in the city charter authorizing any ordinance upon the subject is: "The council shall have the power to license and tax all exchange, loan, and brokers' offices, agencies of insurance offices, . . . in said city," etc.

The appellants, A. G. Simrall & Co., residents of the city of Covington, are insurance agents. As such, they represent in said city the Fire Insurance Association of Philadelphia, Pennsylvania, and judgment for a fine having been rendered against them, as individuals, for failing to take out license as the agents of the association, they are defending against it, upon the ground that the ordinance is invalid. The lower court held otherwise, and they have appealed. It is contended,— 1. That the city charter does not authorize the levy of a license tax against an insurance agent for each company that he may represent, but only against his business or agency; and that when he pays the one license fee he may represent as many companies as see fit to employ him. In our opinion, however, a fair and reasonable construction of the language, "to license and tax all . . . agencies of insurance offices," gives the power to compel each agent to pay the tax as to each company represented by him. It is quite comprehensive in terms; and unless this construction be the true one, an agent representing

a dozen companies only pays as much as he who is the agent of but one, and this, too, although it is probable the former does twelve times as much business as the latter, or at least much more. It cannot well be presumed that the legislature intended such inequality, and a construction is not required which is likely to work out such a result.

It is next urged that the charter provision does not authorize the passage of such an ordinance, and that it is invalid, because it is unequal, unjust, and partial.

Counsel for the city refer to decisions of this court holding that the legislature may impose upon a foreign corporation proposing to do business in this state terms and conditions to the exercise of its powers: *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 331. Undoubtedly, this is the declared rule in this state. The extent of this power need not be considered. Certainly, it reaches so far that the legislature may provide for the safety of our people in dealing with the corporation. The rule is founded upon the fact that the exercise of the corporate powers here rests alone upon comity. If the act of incorporation had of itself extraterritorial force, confusion and conflict between the two powers would constantly ensue.

We fail to see, however, that this rule has any bearing upon this case. The ordinance affects the individual. He is required to pay the tax and obtain the license. Its penalty for a failure is upon him. Indirectly, the interest of the insurance companies may be involved, but the ordinance relates directly to and deals with the individual person, and in this light the question is to be considered. The person who represents a Covington insurance company requires no license, while the representative or solicitor of any other company must obtain a license as to each company he represents. If the representative be a resident of the city, he may employ as many as he may desire to solicit for his company. Thus the ordinance discriminates in two ways. As to the last, however, the appellants are not in an attitude to complain, because they are residents of the city. They are taxed, however, for the privilege of earning a livelihood, while their neighbor, who earns his in the same way, goes untaxed, the only difference being that one works for a city company, while the other represents one located either in or out of the state, but outside of the city.

A doubt as to the constitutionality of a legislative act must

be resolved in its favor; but while the right to license may be delegated to municipal governments by the legislature, yet this authority is to be strictly construed and closely pursued: Sedgwick on Statutory and Constitutional Law, 466.

Municipal corporations may exercise, — 1. Those powers which are expressly granted; and 2. Those necessarily implied or incident to those expressly granted, and which are indispensable to a proper execution of the objects of the corporation. Their authority is not to be so strictly construed as to defeat the legislative intention; but if there be a fair and reasonable doubt of the existence of the power, it should be resolved by a court against the municipality, and especially so if the exercise of it will encroach upon the rights of the individual or the public. The scope of the delegated sovereignty is not to be enlarged by a liberal construction. These principles are elementary, and the citation of authority is unnecessary. They are necessary to the proper maintenance of legislative authority in this direction. Without them, it would dwindle away, resulting in mischief, and behind them, therefore, lies the best of reasons. The legislature has not, however, attempted, by the charter provision of the appellee, to authorize it to pass an unequal and partial ordinance. If it had done so, the legislative power might well be questioned and denied. But the council of the city, under the general power "to license and tax . . . agencies of insurance offices," has enacted what is unmistakably such an ordinance.

Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right. It is a rule, therefore, that where the by-law of a municipality, enacted under a general grant of power or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the state, or make unwarranted or special discriminations.

Cooley on Constitutional Limitations, pages 200 and 202, says: "Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void. . . . So a by-law, to be reasonable, should be in harmony with the general principles of the common law."

Judge Dillon says: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by

one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation": 1 Dillon on Municipal Corporations, sec. 322.

These views are enforced in the cases of *Mayor of Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441; *Robinson v. Mayor of Franklin*, 1 Humph. 156; 34 Am. Dec. 625; *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; and many other cases that might be cited. All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide-water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country.

Thus in *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, an ordinance of a city, passed under a general charter power, exacting a license for selling goods, and fixing one rate for selling goods at the time within the city, and another and much larger for those without, was held invalid, as unjust, partial, and oppressive. In *Mayor etc. v. Althrop*, 5 Cold. 554, an ordinance discriminating between merchants and other dealers residing within and those without the limits of the city, and prescribing a special rate of taxation for the latter, was declared to be beyond the limit of constitutional legislation. In this state, we have no constitutional provision as to taxation *eo nomine*, but it is the settled constitutional rule, declared by oft-repeated decisions of this court, that every tax must be certain, universal, and, so far as practicable, equal and uniform. Burdens cannot constitutionally be imposed upon particular individuals, while others of the same class or locality who have rendered no public service are exempt.

In *Daniel v. Trustees of Richmond*, 78 Ky. 542, a provision of a town charter authorized a tax of five per cent upon all sales made by auctioneers within the limits of the town, except such as might be made by citizens of the town or county who were

bona fide owners of the property sold. The board of trustee adopted an ordinance fixing the license of auctioneers at five dollars for residents of Madison County, and ten dollars for such as were not residents of that county, and this court held that the charter provision was void, because it, in violation of the federal constitution, discriminated against the citizens of other states. The parties whose rights were involved in this case were non-residents of the state, but the court, in the opinion, declared, *arguendo*, against the ordinance also, because it discriminated between residents and non-residents of the county. The same doctrine has been more recently announced by this court in the case of *Fecheimer v. City of Louisville*, 84 Ky. 306.

The ordinance now in question not only discriminates between residents of the city of Covington and those residing outside of it, whether within or without the state, but it places a burden upon some within the city, while others of its residents engaged in a like business are exempt. It is therefore unreasonable, partial legislation. To be reasonable, a municipal by-law should be equal in its operation: *Tugman v. Chicago*, 78 Ill. 405; *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576.

This one being clearly an infringement of individual right, partial and unreasonable in its character, cannot be sustained. The judgment is therefore reversed, with directions to overrule the demurrer to the petition, and for further proceedings in conformity to this opinion.

MUNICIPAL CORPORATIONS — ORDINANCES — DISCRIMINATION BETWEEN RESIDENTS AND NON-RESIDENTS. — An ordinance exacting a fee from dealers not residing in, or who sell goods not manufactured in, the county is unconstitutional: *Marshalltown v. Blum*, 58 Iowa, 184; 43 Am. Rep. 115, and note. Authority in a municipal corporation to license a business does warrant such a tax upon it as discriminates against non-residents: *Mühlenbrinck v. Commissioners*, 42 N. J. L. 364; 36 Am. Rep. 518, and note; *Brooks v. Mangan*, 86 Mich. 576; 24 Am. St. Rep. 137, and note.

MUNICIPAL CORPORATIONS — ORDINANCES — NECESSITY FOR EQUALITY AS TO CLASS TAXED. — The legislature may confer power on towns and cities to impose occupation or license taxes for municipal purposes, and the only restriction imposed is, that the taxes so levied shall be uniform as to class: *Magneau v. Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note. See extended note to *Robinson v. Mayor*, 34 Am. Dec. 627, where this subject is exhaustively treated.

BOSQUETT v. HALL.

[90 KENTUCKY, 566.]

HOMESTEADS — WHO ENTITLED TO — HEAD OF FAMILY. — To entitle a debtor to the benefit of a homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* housekeeper with a family, whether such debt was created before or after the homestead was acquired.

HOMESTEAD — HEAD OF FAMILY. — A debtor is entitled to the benefit of a homestead exemption only when he is a housekeeper, and has residing with him some person whom he is under a natural or moral obligation to support, or who is dependent upon him for support.

HOMESTEADS — HEAD OF FAMILY — WHAT DOES NOT CONSTITUTE. — When the persons residing with a debtor, though children, are strangers in blood to him, and he is under no legal or natural obligation to support them, he is not the head of a family so as to be entitled to a homestead exemption.

Bush and Robertson, and J. D. Irwin, for the appellants.

James C. Poston, for the appellee.

LEWIS, J. To entitle a person to the benefit of homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* housekeeper with a family, whether such debt was created before or after the homestead was acquired.

“In legal contemplation, whosoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family”: *Bell v. Keach*, 80 Ky. 42. And accordingly, an infant brother or sister, or aged and helpless parent, or even a bastard child, may and have been held to constitute a family in the meaning of the statute.

But the persons in this case residing with the debtor, though children, have no natural or legal obligation on the debtor for support, being strangers in blood to him. He may, at any time, separate from and cease to support or care for them without violating any legal or natural obligation; and to so extend the operation of the statute as to exempt the homestead in such case would be not only contrary to the policy of it, but place it in the power of a debtor, by subterfuge and fraud, to defeat his creditors. The construction and operation of the homestead law must be determined by some well-defined rule that is reasonable and just, not according to the mere will or caprice of the debtor.

It seems to us appellee is not entitled to benefit of the

homestead exemption, and the judgment must be reversed, and cause remanded for further proceedings consistent with this opinion.

HOMESTEAD—HEAD OF FAMILY—WHO ENTITLED TO EXEMPTION AS.— The homestead exemption extends to one who has those residing with him so connected with him by ties of blood, or residence and association, as to become a part of his household, and whom he is under a legal or moral obligation to support: *Moyer v. Drummond*, 32 S. C. 165; 17 Am. St. Rep. 850, and note. Where a testator's widow, who is the step-mother of his minor children, undertakes, after his death, to support them, she has a right, as the head of a family, to take a homestead in his real estate: *Holloway v. Holloway*, 86 Ga. 576; 22 Am. St. Rep. 484, and note. An unmarried woman, keeping house and bringing up two children of her deceased sister, is the "head of a family," and entitled to a homestead exemption: *Arnold v. Walts*, 53 Iowa, 706; 36 Am. Rep. 248, and note. A widow occupying a homestead does not cease to be the head of a family by the fact that her married daughter and her husband are taken into the house and reside with her: *Jones v. Blumenstein*, 77 Iowa, 362. See extended note to *Wade v. Jones*, 61 Am. Dec. 586.

HOMESTEAD—HEAD OF FAMILY—WHO ARE NOT.— A husband living as a boarder for seven years, separate from his wife, and not contributing to her support, they having no children, is not the head of a family: *Linton v. Crosby*, 56 Iowa, 386; 41 Am. Rep. 107. An unmarried man, keeping house, and having farm-hands living with him, but having no one dependent on him living with him, is not the head of a family: *Calhoun v. Williams*, 32 Gratt. 18; 34 Am. Rep. 759.

COMMONWEALTH v. SAPP.

[90 KENTUCKY, 580.]

WITNESSES.—HUSBAND OR WIFE IS INCOMPETENT as a witness for or against the other to testify as to any information obtained by either during the marriage, and by reason of its existence, and the same rule prevails even after the marital relation has been dissolved by divorce, or the consent of the opposing party has been given.

WITNESSES.—DIVORCED HUSBAND OR WIFE is competent as a witness for or against the other to testify to acts done by either during the existence of the marital relation, provided that knowledge of such acts was not obtained by reason of the existence of the marriage.

WITNESSES—DIVORCED WIFE, WHEN MAY TESTIFY AGAINST HUSBAND.— Upon the trial of a husband charged with attempting to poison his wife, such wife, who is divorced at the time of the trial, may testify that during the existence of the marriage she saw her husband sprinkle a substance upon a piece of watermelon intended for her which was afterwards shown to contain arsenic.

WITNESSES—HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER.— The "communications" to which neither husband nor wife can testify for or against the other during the marriage or after it has ceased should not be confined to a mere statement by one to the other, but should em-

brace all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known.

WITNESSES — DIVORCED HUSBAND OR WIFE AS WITNESS. — As to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence and relates to the transactions of the one or the other, either may testify for or against the other.

WITNESSES — WHEN WIFE MAY TESTIFY AGAINST HUSBAND. — A wife, either before or after divorce, is a competent witness against the husband when he is charged with having committed or attempted to commit a crime against the liberty or person of the wife during the existence of the marriage.

EVIDENCE — UNCHASTITY OF WIFE. — When the wife has not been called as a witness on the trial of her husband, charged with having attempted to poison her, evidence of her unchastity is inadmissible.

P. W. Hardin, attorney-general, and Finley Shuck, for the appellant.

HOLT, C. J. Upon the trial of William Sapp upon the charge of attempting to poison his wife, the state offered her as a witness against him, avowing by its attorney that it would prove by her she had seen the accused sprinkle a substance upon a piece of watermelon intended for her, and that the portion of it produced at the examining trial, and then shown to contain arsenic, was a part of the piece prepared for her, and was, when so produced, in the same condition as when she got it from him. It is claimed the attempt was made in August, 1888. Afterward, and before his trial, they were absolutely divorced. The court refused to permit her to testify, holding that she could not be a witness for any purpose; and whether this is so is the main question now presented.

It is a general rule of the common law, based both upon public policy and because of identity of interest, that neither a husband or wife can testify for or against the other; and some authorities hold that where this relation has once existed, the one is inadmissible for or against the other, even after the relation has ceased, as to any and all matters that occurred during its existence. They follow Lord Alvanley, who said, in the early case of *Monroe v. Twisleton*, Peake Ad. Cas. 219, that the divorced wife is a competent witness to prove any fact arising after the divorce, but not to prove anything which happened during coverture. Thus Mr. Wharton says: "If a woman be divorced *a vinculo matrimonii*, she cannot prove a contract, or anything else which happened during the cover-

ture. Any fact arising after the divorce she may prove": 1 Wharton's Crim. Law, sec. 774.

It is perhaps questionable whether some of the writers to this effect do not mean that the divorced wife cannot testify as to any matter occurring during coverture, if her knowledge as to it arose by reason of the marital relation. It was held in *State v. Phelps*, 2 Tyler, 374, that a woman, although divorced absolutely, is not a competent witness upon an indictment against her former husband for a crime committed during the coverture, but the court so announced, without any argument, in the opinion, of the question. Cases may, however, be found where courts of high authority have held that a widow may testify against the administrator of her husband as to any facts which she did not learn from the latter, or which did not come to her knowledge by reason of the marital relation, although relating to the transactions of her husband: 1 Greenl. Ev., sec. 338; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578.

In the case last cited, the court said: "The policy of the law only excludes her when her answer will be a violation of the confidence which existed between the husband and wife while the marriage relation continued"; and in *Ratcliff v. Wales*, 1 Hill, 63, which was an action for *crim. con.* with the plaintiff's wife, it was held that while a divorced wife is generally incompetent to testify against the husband as to facts occurring during the marriage, yet she was competent to prove the charge for him, although the act occurred during the existence of the marriage. We fail to see any reason for a distinction, whether she be called as a witness for or against him.

It was held by this court in *Storms v. Storms*, 3 Bush, 77, that the testimony of a husband, after his wife has been divorced from him, is competent against her, if it divulges no communication between them during coverture. In *English v. Cropper*, 8 Bush, 292, the testimony of the widow of the intestate was offered by his administrator to prove facts which came to her knowledge during the coverture, but not by reason of her confidential relation as wife.

It was urged that our then existing law (1871) provided that husband and wife should not testify for or against each other, and that, construing it by the reasons of public policy, which, before its adoption, disqualified them from so testifying, it should be held to exclude them after the dissolution of

the marriage by divorce or the death of one of them; but this court said: "Neither the literal import of the language of the code cited, nor any principle of policy or propriety, will exclude a surviving wife or husband from testifying to facts known by the witness from other means of information than such as result from the marriage relation, where, as in this case, the witness is not otherwise incompetent, although the testimony may relate to transactions of the deceased husband or wife."

Our statute, adopted in 1872, and which, in substance, so far as it bears upon the question we are now considering, is again found in section 606 of the Civil Code, appears to be declaratory of these decisions of this court. It says: "Neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards; provided, however, that in actions where the wife, were she a *feme sole*, would be plaintiff or defendant, the wife may testify, or her husband may testify, but both shall not be permitted to testify": Gen. Stats. 1883, p. 414.

This provision was considered in the case of *Elswick v. Commonwealth*, 13 Bush, 155, where the husband was indicted for a felony, but not one against the wife, who had been divorced before the trial; and it was decided that inasmuch as she had been divorced, she was a competent witness for him to prove facts which came to her knowledge while the marriage relation existed, but not confidentially or by means of her situation as wife. Unquestionably, information obtained by the husband or wife during the marital relation by reason of its existence should not be disclosed, even after the relation has been dissolved. Whether this rule may be relaxed so as to permit the wife to testify against the husband by his consent has been, to some extent, a mooted point, but in this country it has generally been denied. Its importance to the interests of society, protecting, as it does, the peace and harmony so vital to the most intimate of all relations, cannot be overestimated. Its disregard would throw open to the public gaze all that privacy of married life which tends to cement the relation, and destroy, in great degree, if not altogether, that mutual confidence and dependence, the one upon the other, so necessary to its existence. Discord and misery would reign where peace and concord are so necessary. In the language of an eminent legal writer: "The great object of the rule is to secure

domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living": 1 Greenl. Ev., sec. 337.

If the proposed testimony violates marital confidence in the slightest degree, or tends, however slightly, to impair the rule for its protection, the highest considerations forbid its introduction. The word "communication," therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife, or *vice versa*, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case. What the state proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused. If she had not then been his wife, ordinary observation would have enabled her to know all that it was proposed to prove by her. But we think it was competent upon another ground. It was evidence relating to an alleged attempt at felony upon the wife. The rule that husband and wife cannot testify for or against each other is subject necessarily to some exceptions, one of which is, where the husband commits or attempts to commit a crime against the person of the wife: *Stein v. Bowman*, 13 Pet. 221. It was never doubted but what she could exhibit articles of the peace against him. Roscoe says: "It is quite clear that a wife is a competent witness against her husband in respect of any charge which affects her liberty or person": Roscoe's Crim. Ev., 150.

In an English case, where the husband attempted to poison the wife with a cake into which arsenic had been introduced, and the wife was admitted to prove that her husband gave her the cake, it was held by the twelve judges that the evi-

dence was rightly admitted: *Rex v. Jagger*, Russell on Crimes, 632.

In 1 Wharton's Criminal Law, section 769, it is said: "Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence"; and in the case of *State v. Hussey*, 1 Busb. 123, the judge, in delivering the opinion, said: "The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm."

In the case of *People v. Northrup*, 50 Barb. 147, the husband was on trial for administering poison to the wife, and she was admitted as a competent witness.

The policy upon which the rule that the husband and wife cannot testify for or against each other is based is so far overcome as to create the exception by that superior policy which dictates the punishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity. If it be said that our statute forbids the introduction of the husband or wife as a witness against the other, we reply, and so did the common law; and yet the exception named existed, and so it should, in our opinion, under our statute. The necessity of the case requires such a construction, and, as already said, the statute forbidding husband or wife to testify against each other is but declaratory of the common law. As the divorced wife would have been a competent witness if she had still been the wife of the accused at the time of the trial as to the alleged attempted felony upon her, it follows, *a fortiori*, that being divorced did not disqualify her. The accused was allowed to introduce testimony tending to show that the wife was unchaste. She had not testified as a witness, and it is difficult to see upon what ground this was permitted. It is not supposable that a court acted upon the idea that unfaithfulness upon her part to her marital vows authorized her husband to poison her. The evidence was incompetent.

The case of *Turnbull v. Commonwealth*, 79 Ky. 495, is overruled in so far as it conflicts with this opinion.

This opinion is ordered to be certified to the lower court as the law of the case.

Husband and Wife—Privileged Communications between.*

What Communications are Privileged. — At common law, the rule prevails that all private conversations or communications had between husband and wife while they are alone, are to be regarded as confidential and privileged, and cannot be divulged by either when on the witness-stand, either during the existence of the marriage relation, or after its termination by death or divorce: *O'Connor v. Majoribanks*, 4 Man. & G. 435. The same rule prevails generally throughout this country, notwithstanding the "enabling" statutes which have been passed in most of the states: *Leppa v. Minnesota Tribune Co.*, 25 Minn. 310; *Westerman v. Westerman*, 25 Ohio St. 500; *White v. Perry*, 14 W. Va. 66; *Miller v. Miller*, 14 Mo. App. 418; *Ayers v. Ayers*, 28 Mo. App. 97; *French v. Wade*, 35 Kan. 391; *Mercer v. Patterson*, 41 Ind. 440; *Commonwealth v. O'Leary*, 152 Mass. 491; *Raynes v. Bennett*, 114 Mass. 424; *Jacobs v. Hesler*, 113 Mass. 157; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Dexter v. Booth*, 2 Allen, 559; *Dye v. Davis*, 65 Ind. 474; *Keator v. Dimmick*, 46 Barb. 158.

The rule to which we have referred applies in all civil cases, whether the husband or wife is a party or not. If a husband is accused of a crime against the person of his wife, or a wife against her husband, either is competent to testify against the other as to the facts of that particular crime: *State v. Boyd*, 2 Hill, 258; 27 Am. Dec. 376, and extended note 377-381. The reason for the rule in civil cases is thus stated in *White v. Perry*, 14 W. Va. 66-79: "It is nevertheless true that the policy of the law, subserving the fundamental interests of society, so far protects that privacy and confidence which are essential to the marriage relation and necessarily spring from it as not only not to allow, but to prevent, even after the termination of the coverture, any disclosure by the wife which implies a violation of the confidence which was reposed in her as a wife. The law will not permit, even after the death of the husband, any disclosure by the wife which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and affect injuriously the interests of society dependent upon it." In *Miller v. Miller*, 14 Mo. App. 418, it was said: "The fundamental policy of all well-ordered society regards the marriage relation as sacred to the most unreserved confidence between the parties. The intimate union of their interests and of the elements of social welfare and happiness which either may enjoy seem to demand that mutual revelations between man and wife shall be not less free from exterior scrutiny than are one's secret communings with himself. A man must be able to impart to his wife the most critical conditions of his affairs, or even his guiltiness of crime, in the full assurance that no process of law can compel her to a violation of his confidence. But a fair application of this reasoning seems to stop at the point of actual disclosures made between the parties."

Instances of Communications Which may not be Disclosed. — Under the rule that neither husband nor wife is a competent witness to prove communications from one to the other not made in the presence of third persons, opprobrious epithets, which would furnish ground for a divorce as being in-

* REFERENCE TO MONOGRAPHIC NOTES.

Husband and wife, competency of one to testify to the other's adultery, 25 Am. Rep. 744.

Husband and wife, as witnesses against each other, 27 Am. Dec. 377-381.

Husband and wife, competency as witnesses, 24 Am. St. Rep. 663, 664.

tolerable indignities, have been held not to render the husband or wife competent to testify concerning them in an action for divorce: *Ayers v. Ayers*, 28 Mo. App. 97; *King v. King*, 42 Mo. App. 454. A husband is not competent to testify as a witness in his own behalf to a conversation had between himself and his deceased wife, in her lifetime, tending to show that he had not abandoned her: *Dye v. Davis*, 65 Ind. 474. In an action against an executor to recover the price of goods sold and delivered to the wife of the testator in his lifetime, she cannot testify to private conversations with her husband, in which he ratified her purchases: *Dexter v. Booth*, 2 Allen, 559. A wife suing for dower in the land of her deceased husband cannot be allowed to testify to what her husband said to her in his lifetime, while they were alone, tending to show that a deed executed by him, under which the defendant claimed, was not delivered to the grantee until after the grantor was married to the plaintiff: *Keator v. Dimmick*, 46 Barb. 158. The husband cannot be examined as to statements made by his wife during coverture for the purpose of impeaching her testimony: *Roach v. State*, 41 Tex. 261. The defendant upon trial for homicide, who, as a witness in his own behalf, denies the killing, cannot be cross-examined as to conversations occurring between him and one who was his wife at the time of the conversations, though she was subsequently divorced from him. The statute sweeps away all distinction between confidential and other communications between husband and wife, and extends the privilege of any communication made by one to the other during marriage; and no disclosure can be forced from either spouse without the consent of the one against whom the disclosure is sought to be used. The privilege applies to the communication, however its disclosure may be sought: *People v. Mullings*, 83 Cal. 138; 17 Am. St. Rep. 223. In an action by the husband to recover damages for enticing away, debauching, and alienating the affection of his wife, the fact as to whether adultery had been committed by the defendant and the plaintiff's wife can neither be proved nor disproved by any communication had between the plaintiff and his wife after her return: *Higham v. Vanosdol*, 101 Ind. 160. In an action by a wife for a libel, charging her with unchastity and adultery, her husband cannot testify to any disputes or conversations had with his wife during coverture, in relation to the person charged as co-respondent with the wife in the adultery: *Warner v. Press Publishing Co.*, 132 N. Y. 181. As a wife is not a competent witness for or against her husband in respect to any information gained from his confidence in her, she cannot testify in regard to papers consigned to her care by her husband, and kept exclusively by her under her own lock and key: *Stanford v. Murphy*, 63 Ga. 410. The state of a husband's accounts cannot be shown from books kept by his wife from original memorandum kept by the husband from day to day: *Eastabrooks v. Prentiss*, 34 Vt. 457.

In *Goodrum v. State*, 60 Ga. 509, a man was on trial for assaulting another man's wife by placing his arm around her neck against her will. After she had testified to the outrage, her husband was called to discredit her testimony by proving that she delayed complaining to him of the assault when the opportunity presented itself. The court said: "She was the state's witness, and testified to the outrage and the facts attending it. Her husband was not a competent witness to prove, in behalf of the prisoner, that she delayed complaining. What transpired between her and her husband, whether positively by way of communication, or negatively by way of silence, in the privacy and confidence of the marriage relation, is sacred. Neither can be heard to reveal the fact or the matter of a communication

made by the other. For the same reason, the fact of the other's silence ought to be, and we think is, protected. A wife ought to feel, when alone with her husband, as free to be silent as to speak, and as secure that her silence will not be disclosed to her detriment or disadvantage as that what she says will not be repeated. So, too, of a man when alone with his wife; the twain are one flesh; and when they are secluded from all the world besides, their speech and their silence should be alike under the seal of confidence, and as free and unrestrained as the most inviolable confidence can inspire. The fact that the wife did not complain to her husband in their private, confidential intercourse was known to him, if at all, by virtue of that very intercourse; and all knowledge so acquired by husband or wife is inadmissible evidence in a court of justice."

Under the above cases, the husband or wife is incompetent to testify to admissions and conversations between themselves when alone, not only when one of them is a party, but in all cases; and to this effect is *Moore v. Wingate*, 53 Mo. 398. In Illinois, either spouse is incompetent to testify to such communications only when the other is a party, and the witness is called against the other spouse: *Deniston v. Hoagland*, 67 Ill. 265; while in New York such communications are admissible when consent is given or objection is not interposed at the time they are offered: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384. In Minnesota, under a statute providing that neither husband nor wife can, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during marriage, all private conversations between husband and wife, though on subjects not confidential in their nature, are included, and cannot be divulged: *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310. The better rule would seem to be, however, that ordinary conversations between husband and wife on matters of business, not confidential in their nature, nor induced by the marital relation, are not privileged: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384.

Communications in Presence of Third Persons. — Cases exist in which the doctrine is announced that communications between husband and wife, though made in the presence of a third person, are privileged, and cannot be disclosed by either spouse: *Campbell v. Chace*, 12 R. I. 333; and that the wife is not competent to prove what was said by another in conversation with her husband, nor to prove any act done by the other in connection with such conversation, and which might be explained by the conversation: *Holman v. Backus*, 73 Mo. 49; *Waddle v. McWilliams*, 21 Mo. App. 298. Both of the above propositions are opposed to the weight of authority and the better reason. Among the cases maintaining the contrary view may be cited *Fay v. Gwynor*, 131 Mass. 31; *Commonwealth v. Griffin*, 110 Mass. 181; *Higbee v. McMillan*, 18 Kan. 133; *State v. Center*, 35 Vt. 378; *McCague v. Miller*, 38 Ohio St. 595; *Lyon v. Prouty*, 154 Mass. 488. In *Allison v. Barrows*, 3 Cold. 414, it was decided that conversations between husband and wife or admissions made by either of them to the other in the presence of a third person do not belong to the class of privileged communications between husband and wife, and may be given in evidence against the husband, like any other conversation in which he may have been concerned. A widow is competent as a witness on behalf of the estate of her deceased husband to prove a conversation between her husband, in his lifetime, and the opposing party, in relation to the subject-matter of the suit: *Stuhlmüller v. Bwing*, 39 Miss. 447; *Higbee v. McMillan*, 18 Kan. 133. And after the marriage relation has terminated by death or divorce, the wife may testify to statements made during

its existence, in her presence, by her husband to other persons: *Mercer v. Patterson*, 41 Ind. 440.

Communications Heard by a Third Person. — A conversation between an accused and her husband, tending to show an admission of her guilt to him, and overheard by a person in an adjoining room, is not such a confidential communication as will be excluded: *State v. Center*, 35 Vt. 378. A third person hearing a conversation between husband and wife may give evidence of it: *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147; although he is concealed for the purpose of hearing it: *Commonwealth v. Griffin*, 110 Mass. 181. Under the Ohio statute, the presence of a third person must be known to the husband and wife at the time the communication is made; otherwise it is inadmissible: *Westerman v. Westerman*, 25 Ohio St. 500. The only object of this statute is, obviously, to prevent the disclosure of communications between husband and wife overheard by a mere unknown eavesdropper, and if the communication was made in the known presence of a third person, competent to be a witness at the time it was made, the husband or wife may testify to it, although the person who overheard it is dead at the time of the trial: *Sessions v. Trevitt*, 39 Ohio St. 259.

Conversations between husband and wife in the presence of their young children only, who take no part in nor pay any attention to them, are privileged, and cannot be testified to by either husband or wife: *Jacobs v. Hesler*, 113 Mass. 157.

When a transaction is between husband and wife alone, a third person cannot testify to statements in relation thereto, made by the husband and wife to him subsequently to its occurrence: *Brown v. Wood*, 121 Mass. 137.

Letters from Husband to Wife, so long as they remain in the hands of either party to the marriage, are undoubtedly inadmissible in evidence as to the matters therein which may properly be regarded as communications against either spouse. Thus in *Mitchell v. Mitchell*, 80 Tex. 101, it was decided that letters from a husband to his wife, containing declarations in her favor, are not competent evidence in her favor, in a contest with his legatees touching property in litigation. They are confidential communications, and cannot be disclosed. In this case the court said, under a statute reading as follows: "The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife": "The purpose and effect of this statute is to make husbands and wives competent witnesses in every particular, except to disclose confidential communications between themselves. That, and that alone, is not permitted. The only question to be determined in any case is, whether the evidence proposed was a confidential communication between a husband and wife. That must be determined either by the subject-matter of the communication, or the circumstances under which it is made, or both. Whatever difficulties may exist in laying down a general rule by which to decide when such communications should be treated as confidential, we are of opinion that letters from a husband to his wife of the character of those now in question should be so treated. We do not think that the death of one of the parties destroys the privilege, nor that there exists any difference between verbal and written communications. The wife should no more be permitted to disclose a confidential communication written to her by her husband by introducing his letters in evidence, than she should be to testify to confidential statements made to her in conversation with him. We think that the letters should have been excluded." So letters from a husband to his wife, which the latter places in

the hands of her attorney, are privileged communications, which the attorney has no right to produce in court as evidence against the husband to show that he committed perjury in swearing that he did not know her place of residence. Every part of such letters, including the envelopes and addresses, must be treated as confidential communications from the husband to the wife: *Selden v. State*, 74 Wis. 271; 17 Am St. Rep. 144.

Letters from One Spouse to the Other Found in Possession of a Third Person.—There is some conflict in the authorities as to whether or not letters written by a husband to his wife, found in the possession of a third party, are admissible in evidence against him. The better rule would seem to be, that such letters, in the hands of a third person, no matter how he obtained them, are not privileged, but may be admitted in evidence: *State v. Hoyt*, 47 Conn. 518; 36 Am. Rep. 89; *State v. Buffington*, 20 Kan. 599; 27 Am. Rep. 193; *Lloyd v. Pennie*, 50 Fed. Rep. 4. In *Bowman v. Patrick*, 32 Fed. Rep. 368, it was held that where the wife's administrator found among her papers letters from her husband, such administrator, by delivering the letters to an opposing litigant, in a spirit hostile to the husband, could not render them admissible against him, and that they were privileged communications, although in the hands of a third person. The court, in delivering the opinion in that case, said: "I confess I was very much astonished to find that there are some authorities that hold that while the wife cannot be permitted to tell, and not only that, but will be forbidden to tell, what her husband says to her in any matter of marital or private relations, or while the private relation exists, she will be forbidden to tell anything on the stand to the injury of her husband. I say, I am surprised to find, while that general principle prevails, that there are some authorities holding that where this evidence can be got at, either by obtaining possession of a letter, or some method of overhearing communications by some third party between the husband and wife, that this evidence can be used. We have examined these authorities, and we are satisfied that as exceptions they do not include the present case. Whatever exceptions there may be to the general rule protecting communications between husband and wife which may exist, and in regard to which I do not intend to say anything further, I am quite clear that the wife has no right to publish these communications; that she could not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the executor, in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over, to the husband's prejudice, than the wife has."

On the other hand, it was decided in *Lloyd v. Pennie*, 50 Fed. Rep. 4, that letters from a husband to his wife, found in the possession of the wife's administrator after both were dead, were not protected as privileged communications, but were admissible in evidence in an action between the wife's administrator and third parties. Mr. Justice Morrow, in delivering the opinion in this case, commented on *Bowman v. Patrick*, 32 Fed. Rep. 368, and other cases, as follows: "In *Bowman v. Patrick*, 32 Fed. Rep. 368, in the circuit court of the United States for the eastern district of Missouri, a motion was made to strike out certain exhibits filed in the master's report of the testimony in the case. These exhibits were letters written by one of the defendants to his wife, and the ground of the motion to suppress them was, that they were 'such communications as were protected by the principle which the law throws around communications between husband and wife.' The wife had died pending proceedings for a divorce, and the man who pro-

fessed to be the executor or administrator of her estate got hold of these letters, and without any requirement of his office, but in a spirit of hostility to the husband, delivered them to the other side. He was not a party to the action, but was acting as a volunteer in the production of the letters. Mr. Justice Miller, in passing upon the motion, said: 'What might be the rule of law if this administrator had filed these letters in due course of administration for any useful purpose in a public office, and they had been obtained and copied by a third party, or if they had got into the hands of the party who now seeks to use them in any appropriate and innocent manner, I am not prepared to say; but I do rule that, under the circumstances in which these letters got into other hands, they ought not to be used as evidence.'

"The learned judge expressly places his decision upon the circumstances of that case, which, differing materially from the case at bar, cannot be considered as authority in determining the question involved in this controversy.

"In *Stein v. Bowman*, 13 Pet. 220, the plaintiff having read in evidence the deposition of a deceased witness, the defendant called the wife of the deceased to prove that her husband had been bribed to give evidence in that case, and also to prove that he had frequently told her he knew nothing of the plaintiff or of another party. To this testimony an objection was interposed, and the court held that the wife could not 'either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband.'

"In *Lucas v. Brooks*, 18 Wall. 436, the defendant offered the deposition of his wife to prove a part of his case. The court below excluded the deposition, and the supreme court held that, under the statute of West Virginia, where the case arose, the wife could not be examined for or against her husband. The law as stated in these last two cases, as indeed in all the cases cited by counsel for defendant, is not disputed. They simply state the law as declared by the Code of Civil Procedure of this state [California], and as construed by the supreme court in *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, to the effect that communications between husband and wife 'cannot be forced from either party to the confidential relation.' They do not sustain the position that the policy of the law as declared by the courts places the seal of secrecy absolutely and forever upon the communications between husband and wife. The law, in fact, appears to be otherwise. Such communications are received in evidence when produced by parties who do not occupy the confidential relation. In *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193, the defendant was being prosecuted criminally. On the trial the prosecution introduced in evidence a letter from the defendant to his wife. The defendant claimed that this letter was a confidential communication from himself to his wife, and therefore that it was not competent evidence against him. The letter was in the hands and custody of the prosecuting witness at the time it was introduced. It had been previously sent through the post-office, and by mail from the defendant to his wife. The prosecuting witness received it from the post-office, properly directed to the defendant's wife. He delivered it to her, and she, after reading it, returned it to him, and he furnished it to the prosecution, to be read in evidence. It did not appear that either the defendant or his wife had at any time any control over the letter. The court, in passing upon the admissibility of the letter, observed: 'It is certainly true that a communication between husband and wife is a privileged communication. But it is privileged only while it remains within their custody and control, or while it remains within the custody and control of their agents or representatives, and just so far

as it remains within the custody and control of themselves or their agents or representatives.' A number of cases are cited by the court in support of this rule, and the statute of the state of Kansas is quoted as follows: 'In no case shall either [the husband or the wife] be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation existed or afterwards': Civ. Code, sec. 323. The court, referring to this statute in connection with another, relating to witnesses in criminal cases, says: 'It will be seen that these statutes do not go to the extent of excluding said letter as evidence. While the Civil Code provides that neither the husband or wife shall, as a witness, furnish evidence concerning confidential communications, yet it does not provide that others who may happen to be possessed of such communications shall not do so.' In *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, the defendant was on trial for murder. The state offered in evidence sundry letters written by the defendant to his wife, which the state claimed contained admissions inconsistent with the claim of the defendant as to his unconsciousness at the time of the homicide, and as to his unsoundness of mind. To the introduction of the letters the defendant objected, on the ground that the letters were confidential communications between husband and wife, and, as such, could not be used in evidence against the husband. It was not shown how the state obtained the letters, but the court overruled the objection and admitted the letters. The supreme court, in passing upon this ruling of the lower court, said: 'In this ruling the court violated no rule of evidence. The question was, not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not: 1 Greenl. Ev., sec. 254 a. The fact that the communications in this case were written places them on no higher ground than if they were merely oral. And as to the latter, it is well settled that conversations between husband and wife are not privileged so as to prevent a third person, who overheard them, from testifying.'

"It will not be necessary to discuss all the cases cited as bearing on this question. For the present, it is enough to say that I do not think they establish the rule that communications between husband and wife are privileged in the hands of third persons; certainly not under a statute declaring the privilege in the language of the code of this state [California]."

The letters to which the foregoing opinion refers were written by a husband to his wife, instructing her with respect to proceedings taken and to be taken in making fraudulent transfers of his property, and concealing from his creditors the fact that they were fraudulent, and that the property was still held for the benefit of the husband or his wife; and the reception of such letters in evidence might, in our judgment, have been better defended on the ground that with respect to the matters referred to in the letters the communications were made from the one to the other in the relation of principal and agent, rather than in that of husband and wife: See *post*, p. 420; or that the communications were not privileged, because they were acts done in the perpetration of a fraud: See *post*, p. 422.

A written instrument in the handwriting of the wife, found among the papers of her deceased husband, addressed "To whom it may concern," speaking of her husband in the third person, and explaining the cause of their separation, is not a privileged communication: *Hoyt v. Davis*, 21 Mo. App. 235-238, in which Mr. Justice Thompson, in delivering the opinion of the court, said: "As the case must go back for another trial, we think it proper

to say, with a view of saving the necessity of another appeal or writ of error, that in this evidence two documents were presented, one by the defendants, and the other by the plaintiff, which were objected to in each case by the opposing party, but which were nevertheless admitted. The first was a long letter, dated August 6, 1861, shown to have been in the handwriting of the plaintiff, including the signature, and to have been found among the papers of the deceased by his executor. It was addressed 'To all whom it may concern.' It expressed great love for her husband, great sorrow and anxiety at being separated from him, extolled his character and conduct, exonerated him from blame in respect of the separation, put the blame of the separation upon her parents, but did not contain any accusation against herself of improper conduct. Among other things, the letter contained this clause: 'He has not deserved such treatment as he has received from my parents; they have been the whole cause of our separation, by refusing to let me go away with him.' We are of opinion that, in the absence of any evidence tending to show this was intended as a private communication between husband and wife, other than the fact that it was found among the husband's papers after his death, the learned judge committed no error in declining to exclude it as a privileged communication. It was not addressed by the plaintiff to her husband; it nowhere spoke of him in the second person, it was in the form of a narrative, speaking of him everywhere in the third person, and it was addressed 'To whom it may concern.' If it was committed by her to him in the first place, it was manifestly intended by her that it should be exhibited by him to such persons as should be concerned in knowing the causes of their unhappy separation, and was therefore not a privileged communication."

Neither Death nor Divorce Renders Privileged Communications Admissible. — The question is well settled that all such conversations or communications between husband and wife as are confidential and privileged during their lifetime remain sacred after their death, and cannot be disclosed: *Estate of Low*, Myr. Prob. 143; *Farmers' Bank v. Cole*, 5 Harr. (Del.) 418; *Lingo v. State*, 29 Ga. 470; *Stanley v. Montgomery*, 102 Ind. 102; *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578. In an action by a surviving wife on a policy of life insurance on the life of her deceased husband, she cannot testify to the acts or declarations of the husband in making the application: *Herndon v. Triple Alliance*, 45 Mo. App. 426; and in a proceeding for the distribution of the estate of a deceased husband, his widow is not a competent witness to testify as to confidential conversations with her husband during his lifetime, and the existence of the marriage: *Spradling v. Conway*, 51 Mo. 51. In a suit brought by a personal representative of an intestate to recover a debt created in the lifetime of the latter, the widow of the intestate is not a competent witness to testify to any statement of her husband, or to any fact which came to her knowledge by means of the marital relation: *Patton v. Wilson*, 2 Lea, 101. A husband who contests the probate of the will of his wife cannot testify to conversations had with his wife, during marriage, of a confidential character. Public policy, as well as the law, places the seal of secrecy upon communications between husband and wife during marriage, and the death of one cannot remove it: *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276. Under the peculiar law of Louisiana, a widow is a competent witness to prove the dying declarations of her husband, on the trial of one accused of killing him: *State v. Ryan*, 30 La. Ann., pt. 2, 1176.

The rule is well settled, that, on principles of public policy, all communications between the husband and wife which do not on their face appear to

be public, or intended to be so, are shielded from public scrutiny as evidence; and neither can testify as to such communications when the interests of the other are involved, even after the dissolution of the marriage relation by a decree of divorce: *Owen v. State*, 78 Ala. 425; 56 Am. Rep. 40; *People v. Mul-Enga*, 83 Cal. 138; 17 Am. St. Rep. 223; *Dickerman v. Graves*, 6 Oush. 308; 53 Am. Dec. 41; *Hitchcock v. Moore*, 70 Mich. 112; 14 Am. St. Rep. 474; *Maynard v. Vinton*, 59 Mich. 151; 60 Am. Rep. 276. On the trial of an action for the seduction of a wife, she, though divorced, will not be permitted to testify for the defense to facts which came to her knowledge during the existence of the marital relation: *Cross v. Rutledge*, 81 Ill. 266. On the trial of an indictment for adultery, one who has been the husband of the *feme* defendant, but has been divorced from her, is incompetent to testify against her as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted: *State v. Jolly*, 3 Dev. & B. 110; 32 Am. Dec. 656. A divorced wife is incompetent to testify against her husband as to any conversations of a confidential nature occurring between them during the existence of the marriage relation: *Brock v. Brock*, 116 Pa. St. 109. Consequently, after divorce, she cannot testify to a contract made with her husband during coverture: *Cook v. Grange*, 18 Ohio, 526. A divorced wife, in an action against her former husband and his vendee to set aside a deed to the homestead for the reason that her signature to the deed was obtained by duress, cannot be allowed to testify to threats made to her by her husband during the existence of the marriage relation: *Anderson v. Anderson*, 9 Kan. 112. After the dissolution of the marriage by divorce, the wife is not a competent witness to testify in regard to any confidential communication made to her during the marriage by her former husband. The acts of such husband in her presence, in response to questions or suggestions, are confidential communications to her: *Perry v. Randall*, 83 Ind. 143.

Communications not Confidential not Privileged. — A husband or wife, either before or after divorce or the death of one of the parties, is a competent witness for or against the other to prove facts which came to the knowledge of either during the existence of the marriage relation, but not confidentially, nor by means of the situation of husband or wife: *Rigelow v. Sickles*, 75 Wis. 427; *Elswick v. Commonwealth*, 13 Bush, 155; *Crook v. Henry*, 25 Wis. 569; *Haugh v. Blythe*, 20 Ind. 24; *Woolley v. Turner*, 13 Ind. 253; *Cornell v. Van-artedalen*, 4 Pa. St. 364; *Norris v. Stewart*, 105 N. C. 455; 18 Am. St. Rep. 917; *Pickens v. Knieely*, 29 W. Va. 1; 6 Am. St. Rep. 622. The rule has been frequently stated to be, that after the death of the husband, his widow is competent to establish facts coming to her knowledge from other sources, and not by virtue of her marital relation or situation as wife, notwithstanding they related to the transactions of her husband, and that as to such facts so coming to her she is a competent witness in behalf of his estate: *Cannon v. Moore*, 17 Mo. App. 92; *Ryan v. Follansbee*, 47 N. H. 100; *Jackson v. Barron*, 37 N. H. 494; *English v. Cropper*, 8 Bush, 293. After the death of a husband, his wife is competent to testify as to such matters touching his business as came under her observation during his life, and were not learned by communications from him: *Plüvey v. Platon*, 29 Ark. 603. In *White v. Perry*, 14 W. Va. 66-80, the court said: "The law will not permit, even after the death of the husband, any disclosure by the wife which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and affect injuriously the interests of society dependent upon it. But where there is not even a seeming confidence, — when the act done or declaration made by the husband, so far from being

private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public,—there is no interest of the marriage relation, or of society, which, in the absence of all interest of the husband or wife, requires the latter to be precluded from testifying between other parties, such act or declaration not affecting the character or person of her husband. Upon these authorities, I am prepared to say that the wife, after the death of her husband, is competent to prove facts coming to her knowledge from other sources, and not by reason of her situation as wife, notwithstanding they relate to the transactions of her husband. But I am not prepared to say that she is permitted to disclose every communication to her, or in her presence, made by her husband, which does not seem to violate the confidence reposed in her as a wife. I am not prepared to lay down such a proposition, because of the very great difficulty in determining in particular cases whether such communications seem to violate the confidence reposed in her as a wife.” A divorced husband is a competent witness against his former wife as to facts which came to his knowledge during the marriage by means equally accessible to other persons, and not disclosed to him in conversation with her: *Bigelow v. Sickles*, 75 Wis. 427. A divorced wife is competent to testify in behalf of her former husband as to facts which came to her knowledge while the marriage relation existed, but which did not come to her confidentially, nor by means of her situation as wife: *Blawick v. Commonwealth*, 13 Bush, 155. On the trial of an action for the seduction of a wife, she, though divorced, will be permitted to testify to facts occurring after the divorce, in which her former husband did not participate, and which affects her and the person calling her only: *Croce v. Rutledge*, 81 Ill. 266. In a criminal case, the divorced wife of the defendant is competent to testify as a witness against him as to matters which occurred after the divorce, but not as to matters which occurred before: *Long v. State*, 86 Ala. 36. When a woman is on trial for a murder committed in an attack by herself and others upon her husband, the husband and wife having been living apart in great hostility pending divorce proceedings, the husband may testify to the facts of the murder, as they did not come to his knowledge in the confidence of the marriage relation: *People v. Marble*, 38 Mich. 117.

Communications between Husband and Wife as Principal and Agent not Privileged. — The rule is well established, that when a wife acts as agent for her husband, or the husband acts as agent for his wife, either may testify to the acts or communications within the scope of such agency in any case in which such acts or communications are involved, and this, whether either spouse is a party or not, and whether the evidence makes against either or not as the case may be. This rule prevails generally, with, so far as we have been able to find, one exception, notwithstanding the general rule that all acts and communications between husband and wife during the existence of the marriage relation, and made while they are alone, are privileged, and cannot be disclosed in testimony by either. Among the cases which sustain the rule that a husband or wife who has acted as agent for the other is a competent witness to prove any act, fact, or communication made by one to the other during the existence of and within the scope of such agency may be cited *Chunot v. Larson*, 43 Wis. 536; 28 Am. Rep. 567; *Chesley v. Chesley*, 54 Mo. 347; *Quade v. Fisher*, 63 Mo. 325; *Crook v. Henry*, 25 Wis. 569; *Sumner v. Cooke*, 51 Ala. 521; *Robison v. Robison*, 44 Ala. 227; *Mitchell v. Hughes*, 24 Ill. App. 308; *Gifford v. Wilkins*, 24 Ill. App. 367; *Sauter v. Scrutshfield*, 28 Mo. App. 150; *Taylor v. Duesterberg*, 109 Ind. 165; *Curry v. Stephens*, 84 Mo. 442; *Blabon v. Gilchrist*, 67 Wis. 38; *Degenhart v. Schmidt*, 7 Mo. App. 117.

In *Teckenbrock v. McLaughlin*, 25 Mo. App. 524-526, Mr. Justice Thompson, in delivering the opinion of the court, said, on this subject, that "the rule of the common law that neither the husband or the wife was a competent witness for the other had this well-recognized exception: that the wife might testify in the husband's behalf when employed as his agent in any given transaction; and by parity of reasoning, it has been held by our supreme court that the husband is a competent witness for his wife in respect of a matter in which he has acted for her as her agent: *Chesley v. Chesley*, 54 Mo. 347; *Quade v. Fisher*, 63 Mo. 325. The reason of the rule which creates this exception applies with just as much force where the wife acted as the agent for the husband, or the husband for the wife, prior to the coverture, as where he or she so acted during the coverture. Public policy, in the one case as well as the other, requires that an exception to the general rule should exist, in order to prevent failure of justice." In *Darrier v. Darrier*, 58 Mo. 222, the husband had written a letter to his wife, directing her to purchase certain land for him. She had purchased the land accordingly, but took the title in her own name, and afterward claimed the property as hers. In an action brought by the husband, he offered this letter in evidence, and also sought to testify concerning it; but the letter and the testimony were excluded, on the objection of the wife. This ruling was held by the supreme court to be erroneous, and that court said (p. 234): "In reference to this letter, it is quite sufficient to observe, that had the same matter been contained in a power of attorney, no one would doubt its admissibility, or regard it as a confidential communication between husband and wife. How, then, can that admissibility be affected, in the present instance, merely because the instructions sent in the letter do not put on the formalities or assume the shape of a legal instrument? And if the letter is held not within the rule precluding the disclosure of confidential communications, surely the testimony of the plaintiff respecting that letter could not be deemed inadmissible." So in the case of *Schmied v. Frank*, 86 Ind. 250, 257, it was held that statements made by husband and wife to each other, in a transaction in which he was acting as her agent, were not confidential communications, and were not privileged, and the court said: "The authority given by the wife to the husband to transact her business is not confidential, nor intended to be private. Such authority may be in writing, or it may be verbal. It is intended to be known, and would be worthless unless known." One of the first cases to announce this rule was *Crook v. Henry*, 25 Wis. 569, in which it was held that a wife was competent, as against the objections of the husband, to testify that he authorized her verbally to perform certain acts as his agent, that she performed those acts, and that he verbally ratified them. The ruling was put upon the ground that the husband, when he appointed his wife his agent, could not have intended to have her conceal that fact from the public. This doctrine was affirmed by the same court in *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis. 160, 166.

The case of *Southwick v. Southwick*, 49 N. Y. 510, was an action by a wife against her husband to recover an alleged balance of money in his hands belonging to her separate estate and received by him as her agent. The husband testified as to certain matters touching this agency, over objection, and the court of appeals, in passing on this objection, said: "But there is nothing of the nature of confidential or privileged communications in the matters here proved. They are the commonplaces of business and of every-day affairs, and such as pass hourly from a principal to his agent or purse-bearer, and were the same as would have been made by the plaintiff to any other person,

her agent." So it has been decided that conversations between husband and wife, whereby she constitutes him her agent to transact her business, are not confidential communications, and either is a competent witness to prove them: *Schmied v. Frank*, 86 Ind. 250. Even after divorce the wife may testify in replevin by her former husband, and against a third person, that she was authorized by the plaintiff to sell, and did sell, the property in dispute: *Crook v. Henry*, 25 Wis. 569. A wife may testify as to transactions left by her husband solely in her charge, though they occurred at his house, and while he was at home and might have known them: *Lunay v. Vantyne*, 40 Vt. 501. In detinue against a husband for a watch and chain which his wife received from plaintiff, in pawn as security for money loaned by her to him, the wife is a competent witness to prove for the defendant what contract she made with plaintiff, and that she acted as her husband's agent in making it: *Sumner v. Cooke*, 51 Ala. 521. In other jurisdictions, it is held, however, that a wife is not competent to establish that she acted as agent for her husband. The fact of her agency must be shown by some witness other than herself: *Wheeler and Wilson Mfg. Co. v. Tinsley*, 75 Mo. 458; *Williams v. Williams*, 67 Mo. 661. The general rule, however, would seem to be, that she is a competent witness to establish her own agency when acting for her husband: *Mitchell v. Hughes*, 24 Ill. App. 308; and other cases cited *supra*. When a wife acts as agent for her husband, and in his absence enters into a contract in writing with a third person, she is competent, when called as a witness by her husband, to testify to all of the particulars relating to such contracts: *Magness v. Walker*, 26 Ark. 470.

If a wife acts as the agent of another in a contract made with her husband, or where she acts as the mutual agent of her husband and a third person, her declarations as to matters within the scope of her agency may be given in evidence by her husband in his own favor, or they may be given in evidence against him: *Birdsall v. Dunn*, 16 Wis. 235. In Wisconsin, a husband may testify for or against his wife as to matters in which he acted as her agent: *Arndt v. Harshaw*, 53 Wis. 269. Under the United States statutes, a married woman who is a party to an action may disclose, as a witness, directions given to her by her husband as her agent respecting the investment of her separate property, but she cannot be compelled to make such disclosure against her wishes: *Stickney v. Stickney*, 131 U. S. 227. The only authority in conflict with the doctrine above announced which has come to our notice is that of *Commonwealth v. Hayes*, 145 Mass. 289-293, where the court said: "The provision of the statute that 'neither husband nor wife shall be allowed to testify as to private conversations with each other' is not confined to conversations upon subjects which are confidential in their nature, and it includes conversations between them relating to business done by one as agent of the other."

Communications in Perpetration of Fraud not Privileged. — Any communications between husband and wife while they are engaged in the perpetration of a fraud are not privileged, but may be given in evidence. Thus in an action against a husband and wife to set aside a fraudulent conveyance from the former to the latter, the negotiations between them prior to the conveyance relative to the consideration are admissible in evidence: *Beitman v. Hopkins*, 109 Ind. 177. In *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, it was decided that "in a suit to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction for the sale of property induced by fraud, the husband may testify as to conversations had with the tort-feasors, and the husband and wife

may testify as to conversations between themselves as to the transactions, as part of the *res gestæ*, and also on the ground of fraud, and this *ex necessitate rei*. And the party who uses a husband as a mere conduit to convey his fraudulent schemes to the ears of a wife will not be allowed, when the conversations thus induced between husband and wife are offered in evidence in order more fully to unearth his fraud, to interpose the technical objection that, being conversations between husband and wife, they are therefore inadmissible." In addition, the court said: "In the present case, Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed. Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection. The rule he invokes as to confidential communications between husband and wife was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all its protean manifestations. We shall therefore rule that the testimony of both husband and wife was, *ex necessitate*, competent as to their conversations on two grounds: that those conversations were a part of the *res gestæ*, and on the foot of the fraud."

Communication respecting Trust Property not Privileged. — A communication made by a husband to his wife respecting trust property which it is their joint duty to carefully preserve and surrender to the owner when lawfully entitled to it is not confidential, within the meaning of the law relieving husband and wife from any obligation to disclose any confidential communication made by one to the other during marriage: *Wood v. Chetwood*, 27 N. J. Eq. 311.

Objection to Admission in Evidence of Communications between husband and wife, on the ground that they are confidential or privileged, must be made at the time they are offered, or the objection will be deemed to have been waived: *Norris v. Stewart*, 105 N. C. 455; 18 Am. St. Rep. 917. After its admission, it will not be stricken out on motion: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384.

JONES v. GORHAM.

[90 KENTUCKY, 622.]

SUICIDE AS EVIDENCE OF INSANITY. — Suicide may be considered, in connection with other evidence, to establish insanity, but it does not, of itself, establish that fact or want of capacity to make a contract, nor does it establish a presumption of insanity.

SUICIDE AS EVIDENCE OF INSANITY. — Proof of several attempts to commit suicide made by a grantor in a deed shortly before its execution, followed by his suicide shortly after its execution, is not sufficient to establish his insanity or want of capacity to make a contract at the time of the execution of the deed.

Kennedy and Kennedy, for the appellants.

W. S. Gudgell, for the appellee.

BENNETT, J. On the 9th of May, 1884, Laura Jones, wife of the appellant, conveyed to — Robinson her small tract of land, on which she and the appellant lived, in trust, to be conveyed to the appellant, which said Robinson on that day executed. On the eighteenth day of June following, said Laura died, and this action was thereafter instituted by her mother and brothers and sisters, as her heirs, to have said conveyance set aside, upon the ground that said Laura was, by reason of insanity, *non compos mentis*, and the undue influence of the appellant.

The material facts relied on as proof of insanity are, that said Laura, within a few weeks next before she made the deed, made three attempts to commit suicide, and she, after the making of said deed, did commit suicide, and she, about the time of making said deed, would lie down on the wet ground without any rational motive, and pick the grass in a strange manner, and would lock herself up in a room and weep, and she was despondent and gloomy, and her speech was incoherent and irrational, and lastly, the opinion of witnesses that she was insane.

The proof is clear that she made, in April, 1884, two or three unsuccessful attempts to kill herself, and that she did eventually kill herself; but the proof that she otherwise acted irrationally, or that she was otherwise irrational, or that her speech was incoherent and irrational, is contradicted by the overwhelming preponderance of the evidence. The evidence of her physicians, who attended her about the time that she committed these suicidal acts, and about the time that she is said to have talked irrationally, etc., is to the effect that, while she was in delicate physical health, she was rational, and possessed good sense and judgment. Her merchants, with whom she traded in April, 1884, say that she was rational, and possessed good business capacity. Her nurse, who was her attendant for several weeks next before her death, says that she was rational, and had good judgment. Her neighbors and the hands on the place, who were well acquainted with her, and saw her often during the time that she is said to have been insane, say that she was rational, and possessed good judgment and strong will power.

These witnesses, twenty in number, are not of kin to the appellant, save one or two, while all the witnesses for the appellees, save one or two, are either the appellees themselves or their kin. Therefore we are brought to the question, How far

is the fact of the suicidal intentions, and which were eventually carried into execution, to be considered in determining the condition of Mrs. Jones's capacity to make this contract? This question is answered by the cases of *Duffield v. Morris*, 2 Harr. (Del.) 375, and *Brooks v. Barrett*, 7 Pick. 94, and other cases, to the effect that suicide does not of itself prove the existence of insanity or the incapacity to contract; that a person may commit suicide and be quite rational as regards all else; that suicide is not inconsistent with the idea of a sound mind. It is an act contrary to reason, education, and natural instincts; but why should it be evidence of insanity any more than other acts that are contrary to reason, education, and natural instincts? It seems to be a general rule that suicide may be considered, in connection with other evidence, to establish insanity, but it does not, of itself, establish that fact, nor does it create of itself the presumption of insanity.

There is no proof whatever tending to establish undue influence on the part of the appellant. The fact that Mrs. Jones and the appellant agreed that Mrs. Jones was to deed the appellant her estate, and he was to will her his estate, so that the survivor should have the whole estate, does not tend to establish undue influence.

The judgment is reversed, and the case, upon its return, must be dismissed.

INSANITY — SUICIDE AS EVIDENCE OF. — The law does not consider the act of suicide conclusive evidence of insanity; on the contrary, it is held as a crime unless proved, and penalties, as far as possible, are inflicted upon the perpetrator. The compassion of coroner's juries for the friends of a deceased, as often as the fact of insanity, interferes to shield the remains from what is by many thought a barbarous disposition of the law: *Brooks v. Barrett*, 7 Pick. 94; citing *Burrows v. Burrows*, 1 Hagg. Eccl. 100.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

TAYLOR v. COOTS.

[32 NEBRASKA, 80.]

SUMMONS — PUBLICATION, WHEN AUTHORIZED. — AN AFFIDAVIT FOR PUBLICATION of summons which recites that the action is brought to foreclose a mortgage on real estate in a certain county, that the defendant is a non-resident of and absent from the state, and cannot be served with summons therein, is sufficient to authorize service by publication.

SUMMONS — PUBLICATION. — Service of summons upon a non-resident defendant by publication for one week longer than is required by statute, and in the mode prescribed thereby, is sufficient.

SUMMONS. — SERVICE BY PUBLICATION MAY BE PROVED by the affidavit of the book-keeper of the newspaper company publishing it, or by the affidavit of any other person having actual knowledge of the facts, and such proof is sufficient on collateral attack.

JUDGMENTS — FORECLOSURE — COLLATERAL ATTACK. — When, in an action to foreclose a mortgage against a non-resident defendant, the court acquires jurisdiction over him through service by publication, its decree of foreclosure and the sale thereunder are not subject to collateral attack for any errors committed by the court in the course of the proceedings.

JUDGMENTS ON INSUFFICIENT COMPLAINTS — COLLATERAL ATTACK. — The sufficiency of the petition, in an action to foreclose a mortgage, is not a test of jurisdiction, and if the court has jurisdiction, an error committed by it in holding the petition to be sufficient will not render its judgment subject to collateral attack.

B. G. Burbank and John W. Lytle, for the appellant.

William D. Becket and Guy R. C. Read, for the respondent.

MAXWELL, J. A demurrer to the amended petition was sustained in the court below, and the action dismissed. The amended petition was as follows:—

“That prior to the eleventh day of April, 1857, the late Richard J. Taylor was owner in fee-simple of lot 7 in block

181, in the city of Omaha, Douglas County, Nebraska; that the said plaintiff was the wife of the said Richard J. Taylor, who died on or about the — day of February, 1888, and that he left no will nor bequest to any person; that said property was inherited by his heirs, who are the children of this plaintiff and the said Richard J. Taylor, and that said heirs have executed a deed conveying said property to this plaintiff, and she now succeeds to all the rights in said property held by the said Richard J. Taylor; that on said eleventh day of April, 1857, the said Richard J. Taylor executed to one William B. Street a certain mortgage upon said premises held by him at that time, to secure a promissory note in the sum of \$242.80; that on the sixth day of January, 1872, the said William B. Street commenced foreclosure proceedings against said Richard J. Taylor, upon said note and mortgage, by filing a pretended petition in said action. A copy of said petition is as follows, to wit:—

“ ‘ In the District Court, Douglas County. — In Equity.

“ ‘ William B. Street, Plaintiff,	} Petition.
“ ‘ Richard J. Taylor, Defendant.	

“ ‘ Now comes the plaintiff, and complains and says: —

“ ‘ 1. That on the eleventh day of April, 1857, the said defendant made his certain promissory note, dated on said day, at Des Moines, Polk County, Iowa, whereby, for value received, three months after date, I promise to pay to the order of said plaintiff \$243.80, at Oskaloosa, Mahaska County, Iowa, and delivered the same to said plaintiff, who thereby became and still is the true and lawful owner and holder thereof.

“ ‘ 2. That for the purpose of securing the payment of said note by his certain indenture of mortgage of even date therewith, said defendant conveyed to said plaintiff certain lands described as follows: lot 8 in block 99, lot 8 in block 160, lot 1 in block 254, lot 3 in block 184, and lot 7 in block 181, in the city of Omaha, in Douglas County, subject to a condition that the same should be void in case of non-payment of said note at the time agreed to between the parties, which mortgage was duly executed and acknowledged, and on the eighteenth day of July, 1859, recorded in the registry of said county.

“ ‘ 3. That no part of said note has ever been paid or collected, and no proceedings have been had at law to enforce the same.

“Wherefore said plaintiff prays a judgment of foreclosure and sale of said premises; that the proceeds arising on said sale be applied to pay said mortgage debt; that execution be granted for any deficiency that may arise after the said sale, or the proceeds thereof, to answer said debt; and that he may have all other relief necessary and proper, with costs.

“ALBERT SWARTZLANDER, and

“J. M. WOOLWORTH,

“Plaintiff's Attorneys.’

“The above petition was in no manner verified as required by law.

“4. In connection with the above petition, plaintiff filed an affidavit for the purpose of obtaining service by publication upon the said Richard J. Taylor, who is a non-resident of the state of Nebraska. The following is a copy of said affidavit:—

“‘State of Nebraska, } ss.
Douglas County.’

“‘Albert Swartzlander, being duly sworn, says that he is one of the attorneys for plaintiff in above petition; that the plaintiff and defendant is each a non-resident of and absent from this state; that said defendant cannot be served with summons therein; that this action is brought to foreclose a mortgage and the sale of real estate in said county under mortgage.

ALBERT SWARTZLANDER.

“‘Subscribed in my presence and sworn to before me this sixth day of January, 1872. GEORGE ARMSTRONG, Clerk.’

“5. Plaintiff further alleges that said William B. Street commenced the publication of service on the third day of January, 1872, and three days before the petition in said cause and the affidavit for service had been filed in said district court; that proof of said service was filed in said court on the eleventh day of March, 1872; that the affidavit of proof of publication was made by L. Richardson, one of the proprietors of the Omaha Weekly Herald, a newspaper published in Omaha, Nebraska. Wherefore plaintiff says that said service was wholly null and void and of no effect for the purpose of service upon said Taylor.

“6. That on the twenty-eighth day of February, 1872, the said William B. Street commenced a second publication of said notice for service in said newspaper, thereby seeking to obtain jurisdiction in said cause. The affidavit which was

filed to prove the service was made by John S. Briggs, who was a book-keeper of said newspaper, and is as follows:—

“John S. Briggs, being duly sworn, deposes and says that he is a book-keeper of the Omaha Weekly Herald, a newspaper published in Omaha, in said county of Douglas; that the printed notice hereto attached was published in said weekly newspaper five consecutive weeks next after and including the twenty-eighth day of February, A. D. 1872. The said newspaper was, during that time, in general circulation in the county of Douglas and state of Nebraska.

“JOHN S. BRIGGS.

“Sworn to before me and subscribed in my presence this — day of —.

“Plaintiff alleges that said affidavit is no proof of the publication, because the said affidavit is not made by the printer of said newspaper, the foreman, or chief clerk, nor by any one who swears of his own knowledge that said publication was so made, and was therefore null and void.

“7. That on the eighteenth day of April, 1872, a decree was rendered in said cause; that said decree was rendered without the knowledge or appearance of said Richard J. Taylor, or any one for and on his behalf. The following is a copy of said decree:—

“The default of the said defendant having been heretofore entered in this cause, and he still failing to answer the petition herein, on motion of J. M. Woolworth this court computes and finds the amount due by said Richard J. Taylor for principal and interest to the first day of this term, and protest upon the mortgage debt in the petition mentioned, to be \$604.32, and that the several allegations in the said petition are true. It is further ordered and adjudged and decreed,—

“1. That the mortgage premises in the petition mentioned, to wit, lot 8 in block 99, lot 8 in block 160, lot 1 in block 254, lot 3 in block 184, and lot 7 in block 181, in the city of Omaha, Douglas County, Nebraska, be sold by the sheriff of this county, upon said proceedings as are in that behalf prescribed by law for the sale of real estate on execution.

“2. That the sheriff apply the proceeds arising on said sale,—1. To the costs, disbursements, and expenses to which in and about said sale he may be subject; 2. To the payment of his commissions attending said sale and the costs of this suit; 3. To the payment of the said plaintiff of the sum so as aforesaid in and by this judgment found due to him, together with

interest thereon from the first day of this term, and that he may bring the surplus arising on said sale, if any there be, into this court to abide its order in the premises, and that the said sheriff report his proceedings to the court with all convenient speed; 4. That the said defendant be and he is barred and foreclosed of and from all right, claim, and equity of redemption of, in, or to the said mortgaged premises, and every part thereof.'

"8. That the petition above set forth does not set forth a cause of action, but expressly states that said mortgage was to be null and void in case of non-payment of said note at the time agreed to between the parties; that said note was not paid when due. The decree above set forth finds that the several allegations in the said petition are true; wherefore plaintiff alleges that said decree is wholly null and void and of no force and effect.

"9. That the said note and mortgage could not constitute a valid cause of action at the time said suit was commenced, because the statute of limitations had raised a complete bar to the beginning of said suit, no part of said note having been paid within fourteen years from the time when the same was due and payable, and no promise having been made to pay the same after the statute had interposed a bar to the maintenance of the action. Wherefore plaintiff says that all of the said proceedings were null and void.

"10. That on the twenty-fifth day of May, 1872, an order of sale was issued, based upon said decree, and on the twenty-eighth day of June, 1872, said lot 7 in block 181 was sold thereunder to one A. W. Street for \$135; that said premises have been conveyed through numerous persons to the defendant herein; that by reason of the null and void proceedings in said cause, said A. W. Street, and all who claim under and through said sheriff's sale, had due and legal notice of the rights of the said Richard J. Taylor in and to said premises, and that defendant herein is not a *bona fide* purchaser of the same.

"11. That there was no affidavit filed whereon to base a second publication in said newspaper heretofore mentioned, and that the affidavit first filed for service by publication was null and void for the purpose of forming a basis for a second publication of service; that she hereby tenders into court such sum of money as the court may find is due the defendant herein by reason of said foreclosure suit, or the sale thereunder,

in case the court finds any sum to be so due and a charge upon said estate. Wherefore plaintiff prays that said title to said lot be forever quieted in this plaintiff, and for costs of suit."

The question presented in this case is, Did the court in the action to foreclose the mortgage have jurisdiction? The fourth subdivision of section 77 of the code provides for service by publication "in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation.

"Sec. 78. Before service can be made by publication, an affidavit must be filed that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication.

"Sec. 79. The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, then in some newspaper printed in the state, of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.

"Sec. 80. Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section, and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same."

It will be observed that it appears from the affidavit for publication that the action was brought to foreclose a mortgage on real estate in Douglas County, and that the defendant was a non-resident of and absent from the state, and could not be served with a summons therein. This was sufficient to authorize service by publication.

The notice to the defendant was published five consecutive weeks, evidently out of a superabundance of caution, so that the publication should be for four full weeks. This was proper, and favorable to the defendant, although all that the law re-

quires is four weekly publications. The notice, therefore, was sufficient.

It is objected that Briggs, who swears to the publication, was book-keeper of the Omaha Weekly Herald, and therefore the proof of publication is not sufficient. Section 80 provides that the service may be proved by the affidavit of the printer, his foreman or principal clerk, or other person knowing the same. The book-keeper no doubt was principal clerk of the Weekly Herald, and had express authority to make the affidavit. The number of publications could be proved by any one knowing the facts, even if not connected with the paper, and were it necessary, the court would permit proof to be made even after judgment. But that is unnecessary in this case. The case was tried before a capable and painstaking judge, who no doubt was convinced that Briggs was the principal clerk, and the court held the affidavit sufficient, and in this collateral attack we must so hold.

Objections are made to the petition to foreclose the mortgage, that it does not state facts sufficient to constitute a cause of action. The court before which the case was tried sustained the petition and granted the decree of foreclosure and sale, and after the sale of the premises, confirmed it and caused a deed to be made to the purchaser. The sufficiency of the petition is not a test of jurisdiction. This court so held in *Trumble v. Williams*, 18 Neb. 144. The court may commit an error in sustaining an insufficient petition. That, however, does not affect the validity of the judgment, if no direct proceeding is had to vacate or set it aside, providing the court had jurisdiction.

A number of the questions presented in this case were decided in *Day v. Thomson*, 11 Neb. 123, and the sale of real estate under an attachment sustained. The whole course of the legislation of this state has favored the repose of titles. A reasonable time is given to every one to assert his claims in the courts, but if he fails to do so within the periods provided by law, his right to proceed will be barred. There is but little justice in allowing a party to lie by for thirty years and practically abandon his claim to certain real estate, allow others to pay the taxes and bear the burdens cast upon it with the various improvements, and to support the state government and state institutions, and afterwards come in, with an air of injured innocence, claiming the land as his own. Such con-

duet does not comport with good citizenship, and should not be encouraged by the courts.

The petition fails to state a cause of action, and the demurrer thereto was properly sustained. The judgment of the court below is therefore affirmed.

SUMMONS — PUBLICATION — WHEN AUTHORIZED. — An order for publication of summons must be based on an affidavit by the plaintiff showing affirmatively an existing cause of action against the defendant; otherwise the court will not acquire jurisdiction of the defendant: *Beckett v. Cuenin*, 15 Cal. 281; 22 Am. St. Rep. 309, and note. The affidavit should show that the defendant is a non-resident of and cannot be found within the state, and that due diligence to find him has been exercised: *McCracken v. Flanagan*, 127 N. Y. 493; 24 Am. St. Rep. 481, and note.

SUMMONS — SERVICE BY PUBLICATION — HOW PROVED. — The plaintiff's attorney may deposit a copy of the summons and complaint in the post-office, and his affidavit that he did so is competent evidence: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34. The proof of service of summons by publication is the affidavit of the printer, his foreman or principal clerk, showing that publication has been made, stating where and how long, and an affidavit showing a deposit in the post-office, if such deposit was required: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note.

JUDGMENT — COLLATERAL ATTACK FOR ERRORS. — When a court has jurisdiction of the subject-matter and the parties, its judgment cannot be collaterally impeached for errors of law or irregularities in practice: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and extended note; *Cheatham v. Whitman*, 86 Ky. 614. A judgment rendered upon notice by publication is not void, although erroneous, and is not subject to collateral attack: *Messig v. Lesser*, 120 Ind. 239; extended note to *Hahn v. Kelly*, 94 Am. Dec. 762.

EXCHANGE NATIONAL BANK v. CAPPS.

[32 NEBRASKA, 242.]

CORPORATIONS — CAPACITY. — The maker of a note payable to a bank cannot, in an action on the note, question the incorporation by demurrer.

PLEADING CORPORATE EXISTENCE. — A corporation may sue or be sued in its corporate name without averring the act of incorporation.

Tibbets, Morey, and Ferris, for the appellant.

John M. Ragan, for the respondents.

MAXWELL, J. The plaintiff brought an action against the defendants in the district court of Adams County upon a petition, as follows: —

**"Exchange National Bank, Hastings,
Nebraska.**

Q.

***Lucius J. Capps and Willis P. McCreary, copartners under name and style of Capps and McCreary.**

"FIRST CAUSE OF ACTION.

"1. Plaintiff complains of defendants, and alleges that on the twenty-fourth day of October, A. D. 1888, defendants did make and deliver to plaintiff a promissory note, in writing, in the following words, viz.:—

" ' \$250.

HASTINGS, NEB., Oct. 24, 1888.

“ ‘Sixty days after date, for value received, we promise to pay to the order of the Exchange National Bank, Hastings, Nebraska, two hundred and fifty dollars, with interest at the rate of ten per cent per annum from maturity until paid. Negotiable and payable at the Exchange National Bank, Hastings, Nebraska.

"'No. 13108. Due Dec. 25-26, 1888.'

"SECOND CAUSE OF ACTION.

“1. Plaintiff alleges that on the twenty-sixth day of December, 1888, defendants made and delivered to plaintiff a certain promissory note, in writing, in the words and figures following, to wit: —

“ ‘ \$341.75.

HASTINGS, NEB., Dec. 26, 1888.

“ ‘Ninety days after date, for value received, we promise to pay to the order of the Exchange National Bank, Hastings, Nebraska, three hundred and forty-one and $\frac{7}{100}$ dollars, with interest at ten per cent per annum from maturity until paid. Negotiable and payable at the Exchange National Bank, Hastings, Nebraska.

"No. 3526. Due March 26-29, 1889.

“(Signed)

CAPPS & MCCREARY.

"8. No part of said notes has been paid, and there is now due the plaintiff from defendants the sum of five hundred and ninety-one and $\frac{1}{100}$ dollars, with interest on \$250 thereof from December 25, 1888, and on \$341.75 thereof from March 25, 1889, at the rate of ten per cent per annum, for which, with costs of suit, plaintiff prays judgment."

The defendants demurred to the petition, on the ground that the plaintiff had not legal capacity to sue. The demurrer was sustained and the action dismissed.

In *Platte Valley Bank v. Harding*, 1 Neb. 461, it was held that the maker of a note payable to a bank, in an action on the note, cannot raise the question of the bank's incorporation. In Angell and Ames on Corporations, section 632, it is said: "It is, however, generally admitted that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation, or averring that it is a corporation, if the act be private."

At common law, it is not necessary to set forth in the declaration the act of incorporation, when an action is brought in the corporate name. The code was designed to simplify procedure. There is no requirement of the statute that the act of incorporation shall be averred, and it seems to be sufficient to bring the action in the corporate name.

In *Stanley v. Richmond etc. R. R. Co.*, 89 N. C. 331, it is said: "It is difficult to assign any sufficient reason why a corporation suing or sued should be designated by any further description than its corporate name which does not apply with equal force to a natural person, the only purpose in either case being to point out the party to the action. The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and if intended to be disputed, it should be, under the present practice, by answer."

So under the section of the Iowa Code in regard to actions on written instruments, when "suit may be brought by or against any of the parties thereto by the same name and description as those by which they are designated in such instrument": *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11; 4 Am. & Eng. Ency. of Law, 285. There is no requirement of the code that authorizes a court to insist upon setting out the act of incorporation in an action brought in the corporate name. The common law prevails in this state in all matters where there is no statute to the contrary. The code has not changed the common law in this respect. It was therefore unnecessary to aver the act of incorporation.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

ESTOPPEL TO DENY CORPORATE EXISTENCE BY ONE DEALING WITH CORPORATION AS SUCH. — One who executes a note payable to a corporation is estopped to deny its existence when the note was executed: *Jones v. Bank*, 8 B. Mon. 122; 46 Am. Dec. 540; *Congregational Society v. Perry*, 6 N. H. 164;

25 Am. Dec. 455, and note; *John v. Farmers' etc. Bank*, 2 Blackf. 367; 20 Am. Dec. 119. One who has contracted with a corporation *de facto* in its corporate capacity, and within the scope of its powers, is estopped to deny its corporate existence: *Snider v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887; note to *Cravens v. Eagle Cotton Mills Co.*, 16 Am. St. Rep. 306; *Yard v. Pacific etc. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467, and note.

CORPORATIONS — NECESSITY FOR ALLEGING CORPORATE EXISTENCE BY. — Corporate existence need not be alleged in a suit by a corporation, on a contract entered into by it in the style of a corporation: *Stein v. Indianapolis Building etc. Ass'n*, 18 Ind. 237; 81 Am. Dec. 353, and note; *Heaton v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; 79 Am. Dec. 430. Where a corporation is plaintiff in an action, it need not be alleged in the complaint that plaintiff is a corporation: *Central Bank v. Knowlton*, 12 Wis. 624; 78 Am. Dec. 769; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267; 29 Am. Dec. 372, and extended note. The same is true of foreign corporations: *Bennington Iron Co. v. Bathorford*, 18 N. J. L. 105; 35 Am. Dec. 528, and note.

CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY v. WITTY.

[32 NEBRASKA, 275.]

CARRIER OF ANIMALS — CONTRACT LIMITING LIABILITY. — A common carrier of live-stock cannot, by contract with a shipper, relieve itself in any manner from liability for damages arising from loss or injury resulting from its own negligence.

M. A. Low and W. F. Evans, for the appellant.

Letton and Hinshaw, for the respondent.

NORVAL, J. The defendant in error shipped a stallion over the railway of the plaintiff in error from Henry, Illinois, to Jansen, Nebraska. The horse died shortly after reaching the place of destination, by reason of injuries received in transportation, as is claimed, caused by defendant's negligence. The action is for the recovery of the value of the animal. There was a trial by jury, and a verdict and judgment for plaintiff for four hundred dollars. Defendant prosecutes error. The petition alleges, in substance, that on the thirty-first day of October, 1888, at Henry, Illinois, the plaintiff delivered to the defendant, as common carrier for hire, a certain stallion of the value of eighteen hundred dollars, to be transported over its railway to Jansen, in this state; that the defendant undertook to do so for the stipulated sum of thirty dollars, which was then and there paid by plaintiff to the defendant; that the defendant did not safely convey and deliver said

stallion as it had undertaken to do, but, on the contrary, conducted itself so carelessly and negligently, in and about conveying and transporting the same, that said stallion was severely hurt, bruised, and injured, to such an extent that it died from the effects of said injuries on the same day it arrived at Jansen; and that said injuries were caused by the gross negligence of the defendant in and about the operation of its train, of which the car containing said horse formed a part.

The defendant's answer admits the receipt and transportation of the animal as stated in the petition; denies all allegations of negligence; sets up that the stallion was received by the defendant for transportation under a contract in writing, made by it with the plaintiff, whereby, in consideration of a reduction of the freight on said animal from fifty-four dollars to twenty-seven dollars, it was agreed the liability of the defendant for damages to said animal should not exceed one hundred dollars, and that the regular charges for the transportation of a stallion over defendant's road from Henry to Jansen was fifty-four dollars, when the animal was of greater value than one hundred dollars, except in cases where, by agreement with the owner, the liability of the company for damages to such animal was limited to one hundred dollars, and the owner assumed the risks as provided in the written contract in this case.

The answer also denies that the horse was injured in transportation, or that it died from the effects of such injuries, and alleges that the immediate cause of his death was pneumonia. The value of the animal was put in issue by the answer.

The plaintiff in his reply alleges that thirty dollars was the only sum of money demanded of plaintiff, or mentioned to him as being the regular rate of freight for the carriage of such horse, and that plaintiff was not informed and had no knowledge that said sum was not the full, regular rate of charge for such carriage.

The second paragraph of the reply is as follows:—

“Plaintiff avers no consideration was ever received by him for the signing of a certain paper or papers presented to him by the agent of defendant at Henry for signature; denies that any reduction of freight rates was ever made to him; denies that he ever entered into any contract or agreement to release the defendant from liability as a common carrier for the safe delivery of said stallion; and avers that if the papers he signed

contained any such pretended contracts or agreement, plaintiff had no knowledge of the same, and was ignorant that any such release, contract, or agreement was ever signed by him. Plaintiff further says that any such release and agreement, if any there be as alleged, is without consideration, and null and void, and is against public policy, and contrary to law, and inoperative to release said defendant."

The proof shows beyond controversy that the horse was sound and in good condition when he was placed in the car at Henry, and that when the car reached Jansen the horse was severely bruised and injured, from the effects of which he died shortly after being unloaded. The evidence tends to show that the bruises and injuries were caused by the careless, negligent, and violent manner in which the defendant handled the car in which the horse was being transported. Indeed, it is not contended by the plaintiff in error that the evidence on the question of its negligence in operating and handling its cars was not ample to sustain the verdict of the jury.

The sole ground on which we are asked to reverse the case is the alleged error of the court in its refusal to give to the jury the following instruction, asked by the plaintiff in error:—

"3. The court instructs the jury that under the law and evidence in this case, plaintiff cannot, in any event, recover any sum exceeding one hundred dollars, with seven per cent interest thereon from the third day of November, 1888."

Whether this request should have been given depends upon whether the written contract for the transportation of the horse, pleaded in the answer and introduced on the trial, is valid and binding.

The following is a copy of the contract referred to:—

Form 8.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

LIVE STOCK CONTRACT.

Live Stock in quantities LESS THAN A FULL CAR LOAD will be charged for on basis of estimated weights as per current Classification.

Live Stock in car loads or less will not be taken, unless this contract, under which the Company assumes no responsibility for loss, damage, or delay to the Stock, is executed by the Station Agent and Shipper.

Agents are not allowed to receive and ship such live stock until a proper contract or release is signed by the owner or shipper thereof.

Two or three cars of stock will entitle the owner or his agent to pass on the train with the stock to take care of it; four to seven cars, inclusive, belonging to one owner, two men in charge; and eight cars or more, three men in charge, which is the maximum number that will be passed by one owner. ONE

It is also agreed that the said Railway Company receives live stock only subject to owner's risk for delays, damages, or losses which may be caused by enforcing quarantine regulations established by the authorities of the several States, Territories, or District through or into which they are to be transported; and all expenses, damages, and losses which shall be incurred because of such regulations shall be borne by the owner.

It is also agreed that no stop-over privileges will be granted on return passes.

WITNESS, the name of the Railway Company by its duly authorized agent, and signature of the shipper hereto, the day and year first above written.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

C. H. MOSS, Agent.

W. H. WITTY, Shipper.

M.

[Printed across the face, in red ink: "Read this contract." "Duplicate."]

While the plaintiff neither admits nor denies directly the execution of the above contract in his reply, the allegations of the second paragraph thereof are, in effect, an admission that the plaintiff signed the agreement: *Dinsmore v. Stimbert*, 12 Neb. 433.

But outside of and independent of the admission of the pleading, the execution of the contract is proved by evidence that is undisputed. C. H. Moss, who was the defendant's agent at Henry, Illinois, when the horse was delivered to the company for shipment, testifies that the contract was prepared in duplicate and signed by the plaintiff, and by the witness on behalf of the company at that time, each retaining one of the duplicates. This testimony is in no manner denied.

The execution of the agreement being established, the question then arises, Is the clause therein limiting the liability of the company to an amount not exceeding one hundred dollars valid and binding, when the loss was occasioned by the negligence of the carrier?

The contract in the case at bar was entered into in the state of Illinois, and was to be performed within the states of Illinois, Iowa, Missouri, and Nebraska. In passing upon its validity, we shall not take into consideration the provisions of the constitution and laws of this state which relate to the limitation of the liability of railroad companies as common carriers; nor do we determine whether the provisions of our constitution and statutes apply to such a contract. As we view it, the stipulation in the contract limiting the liability of the plaintiff in error for its own negligence is invalid under the rule of the common law.

With certain well-defined exceptions, a carrier of live-stock

is an insurer, not only of the safety of the property while being transported, but for its safe delivery to the owner at the place of destination. The law does not hold it liable for injuries resulting unavoidably from the inherent nature and propensities of the animals transported, nor for damages occasioned from the act of God or the violence of public enemies. We do not doubt that a carrier may, by contract fairly entered into, limit in some respect its liability as an insurer, or its common-law liability, where the restriction imposed is reasonable. But on grounds of public policy, the law has wisely prohibited a common carrier of freight from in any manner contracting against its own negligence. This doctrine was distinctly held and applied in *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 117. Gantt, J., in the opinion, says: "The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is, that it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty."

Decisions are to be found which lay down a contrary doctrine, but the better reason, as well as the current of authority in this country, sustain the rule announced by this court in the case referred to: See *Railroad Co. v. Lockwood*, 17 Wall. 357; *Grand Trunk R'y Co. v. Stevens*, 95 U. S. 655; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Shriver v. Sioux City & St. P. R'y Co.*, 24 Minn. 506; 81 Am. Rep. 353; *Welsh v. Pittsburg etc. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; 15 Am. Rep. 740; *McCune v. Burlington etc. R'y Co.*, 52 Iowa, 600; *Ortt v. Minneapolis etc. R'y Co.*, 36 Minn. 396; *Ormsby v. Union Pac. R'y Co.*, 4 Fed. Rep. 706; *Rintoul v. New York Cent. etc. R. R. Co.*, 17 Fed. Rep. 905; *East Tenn. etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Kiff v. Atchison etc. R'y Co.*, 32 Kan. 263; *Illinois C. R. R. Co. v. Morrison*, 19 Ill. 136; *Illinois C. R. R. Co. v. Adams*, 42 Ill. 486; 92 Am. Dec. 85; *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 53; *Durgin v. Am. Exp. Co.*, 20 Atl. Rep. 328; N. H., July, 1890; *Adams Exp. Co. v. Holmes*, 9 Atl. Rep. 166; Pa., April, 1887; *Morrison v. Phillips etc.*

Construction Co., 44 Wis. 405; 28 Am. Rep. 599; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; 42 Am. Rep. 718; *Erie R'y Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451.

The recovery in this case is placed solely upon the ground of the negligence of the plaintiff in error in handling of its cars. As the stipulation in the contract under which the horse in question was shipped relieved the carrier from all liability for damages, excepting those which should result from its own gross negligence, such provision is contrary to sound public policy, and is therefore void.

It is claimed that the limitation in the contract as to the amount of damages in case of loss or injury does not tend to exempt the carrier from liability for negligence. The authorities cited in brief of plaintiff in error so hold, but we are unable to draw such a distinction. If a carrier cannot, by stipulation, be relieved from liability for its negligence, it is equally clear, for the same reason, that it cannot, by contract with the shipper, limit the amount of damages resulting from such negligence. If the plaintiff in error can lawfully stipulate that the damages shall not exceed one hundred dollars, it could likewise contract that it should not be more than twenty-five dollars, or any smaller sum, thereby practically relieving itself from all responsibility for injuries occasioned by its own negligence. That would be accomplished indirectly, what it could not lawfully do directly. The proof fully shows that the horse, when shipped, was worth not less than four hundred dollars, and to hold that the owner can only recover one fourth that sum would be to exempt the carrier from a part of the liability assumed by it for injuries resulting from its own carelessness or negligence. This the law will not sanction: *Morrison v. Phillips etc. Construction Co.*, 44 Wis. 405; 28 Am. Rep. 599; *Black v. Goodrich Trans. Co.*, 55 Wis. 319; 42 Am. Rep. 718; *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *Express Co. v. Moon*, 39 Miss. 822; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Moulton v. St. Paul etc. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Boehl v. Chicago etc. R'y Co.*, 44 Minn. 191; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360.

The evidence shows that the plaintiff in error had two rates for the transportation of stallions from Henry to Jansen. The

rate was fifty-four dollars per head when the carrier bound itself to pay the full damages sustained by the shipper, and the sum of twenty-seven dollars was charged when the carrier stipulated its liability should not exceed one hundred dollars per head. In the case we are considering the horse was shipped under the cheaper rate. Doubtless, carriers have the right to fix their charges for transportation according to the value of the property to be carried, and where, by a contract fairly made between carrier and shipper, the latter obtains a reduced rate by reasons thereof, the value thus agreed upon will be the limit of the carrier's liability, except where the damages are the result of its own negligence. In other words, a carrier may, by stipulation, limit its responsibility in respect to any unavoidable injury or loss, but not from liability for damages caused from its own negligence. This rule is but fair and just, and violates no principle of public policy.

The instruction requested was therefore properly refused. The judgment is affirmed. —

CARRIERS OF LIVE-STOCK — LIMITATION OF LIABILITY FOR NEGLIGENCE. — A common carrier may provide by express agreement that owners of live-stock delivered to it for carriage shall assume all the risks of carriage from whatever cause not arising from its own negligence or that of its servants: *Betts v. Farmers' Loan etc. Co.*, 21 Wis. 80; 91 Am. Dec. 460, and note; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28, and note. It may also limit its liability for any damage to stock, except that caused by collision or running off the track: *Georgia Railroad v. Spears*, 66 Ga. 485; 42 Am. Rep. 81, and note. See extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208, for a full discussion of the liability of carriers of live-stock, and their right to limit such liability.

PHOENIX INSURANCE COMPANY v. BACHELDER.

[82 NEBRASKA, 490.]

INSURANCE — FORFEITURE FOR NON-PAYMENT OF PREMIUM. — When a policy of fire insurance provides that a failure to pay the premium note thereon at maturity suspends the policy until payment is made, but that it may be revived for the balance of the term by making full payment at any time before loss, the insurer is not liable for a loss occurring after the maturity of the premium, and after it has been partly, but not fully, paid.

INSURANCE — PLEADING — WAIVER OF CONDITION. — A waiver of the conditions of a fire insurance policy in regard to the payment of the premium note thereon, to be available against the insurer, must be pleaded.

INSURANCE — WAIVER OF PROOF OF LOSS. — A denial of all liability by the

insurer, on the ground that the policy was not in force at the time of the loss, by reason of the failure of the insured to pay his premium as provided for therein, dispenses with the necessity of furnishing preliminary proofs of loss.

Fawcett and Sturdevant, and John P. Davis, for the appellant.

A. U. Hancock, for the respondent.

NORVAL, J. This is an action on a policy of fire insurance. There was a trial to a jury, which resulted in a verdict for the plaintiff. The defendant brings the case into this court by petition in error.

We are asked to reverse the case, upon two grounds: 1. The failure of the defendant in error to pay his past due premium note; 2. Failure of the insured to furnish the preliminary proofs of loss, according to the terms and conditions of the policy. We will briefly examine the points in the order named.

The policy provides that "in case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term."

The consideration for issuing of the policy was ten dollars cash, and the payment at maturity, the assured promissory note for twenty-two dollars. The note was payable on the first day of August, 1889. No part of the twenty-two dollars was paid when due, and a balance of seven dollars remained unpaid at the time of the fire. The defendant in error held two policies from this company, one for one hundred dollars, and the other for one thousand dollars, on buildings which were detached when the policies were issued, but the buildings were subsequently joined together. A new policy, the one in suit, was issued, covering the building thus formed. Evidence was introduced tending to show that one Weymouth, a soliciting agent of the company, agreed to cancel the old policies and apply the unearned premiums on the new. It is claimed by the plaintiff in error that the agent had no power to make any such agreement. Conceding, as is claimed by the insured, that the company is bound thereby, and that the unearned premiums on the old policies should be credited upon the

note, there would remain unpaid a small balance, and he would still be in default at the time of the fire.

It is obvious that the failure to pay the premium note at maturity suspended the policy until payment was made. It could have been revived, for the balance of the term, by making full payment at any time before the loss. This, as we have seen, he failed to do. True, after maturity of the note, he paid fifteen dollars thereon, but this did not give him the right to avail himself of the benefits of the contract of insurance. Nothing short of full payment, or a waiver of the stipulation in the policy, could have the effect to remove the suspension caused by the failure to pay the note. The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his note, the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to enforce the one they have made. To hold that the policy was in force at the time of the fire would be to set aside and disregard the plain stipulation of the parties: *Gorton v. Dodge Co. Mut. Ins. Co.*, 39 Wis. 121; *Shakey v. Hawkeye Ins. Co.*, 44 Iowa, 540; *Garlick v. Mississippi Val. Ins. Co.*, 44 Iowa, 553; *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Williams v. Albany City Ins. Co.*, 19 Mich. 451; 2 Am. Rep. 95; *Curtin v. Phoenix Ins. Co.*, 78 Cal. 619.

There was some evidence offered for the purpose of showing that the company waived the terms of the policy in regard to the payment of the premium note, but such evidence, under the pleadings as framed, could not avail the defendant in error. The issue was squarely presented by the pleadings whether or not the note was paid. We doubt not that the stipulation in the policy can be waived, but when such waiver is relied upon, it must be plead: *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266; *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337; *Mehurin v. Stone*, 37 Ohio St. 58; *Palmer v. Sawyer*, 114 Mass. 13; *Nichols v. Larkin*, 79 Mo. 264.

The policy provides that loss will be paid "upon receipt of proper proofs at its Chicago office." It also provides that "in case of loss or damage, the assured shall forthwith give notice of said loss, in writing, to the company." The evidence shows that the insured, immediately after the fire, notified, in writing, the company of the loss, but it does not appear that he ever furnished the preliminary proofs of loss. The existence of a loss has not at any time been denied by the com-

pany. In fact, it is admitted by the answer, under which the case was tried, that the house was totally destroyed. The company has at all times insisted, and now insists, that it was not liable for the loss, on the ground that the policy was not then in force, by reason of the failure of the insured to pay his premium note. The plaintiff in error, by denying all liability, dispensed with the necessity of furnishing proofs of loss: *Carson v. German Ins. Co.*, 62 Iowa, 433; *Kansas Protective Union v. Whitt*, 36 Kan. 760; 59 Am. Rep. 607; *King v. Hekla F. Ins. Co.*, 58 Wis. 508; *Taylor v. Merchants' Ins. Co.*, 9 How. 890; *Continental Ins. Co. v. Lippold*, 3 Neb. 891.

The judgment is reversed, and the cause remanded for further proceedings.

INSURANCE — FORFEITURE OF POLICY FOR NON-PAYMENT OF PREMIUM. — When a policy of life insurance provides that if the premiums are not paid at maturity, the policy becomes void, in the event of the death of the insured before the payment of an overdue premium, the policy is void: *Lantz v. Vermont etc. Ins. Co.*, 139 Pa. St. 546; 23 Am. St. Rep. 202, and note. During the default of an insured in paying a premium note, the policy is suspended, when the policy provides that "in case the assured shall fail or refuse to pay the premium note when due, this policy shall thenceforward remain null and void, and the same cannot be revived without the consent of the company": *Curtin v. Phoenix Ins. Co.*, 78 Cal. 619. As to the forfeiture of an insurance policy for the non-payment of interest on the premium notes, see *Holman v. Continental etc. Ins. Co.*, 54 Conn. 195; 1 Am. St. Rep. 97, and note.

INSURANCE — PROOFS OF LOSS — WAIVER OF, BY DENIAL OF LIABILITY. — If an insurance company, without making any objection to the absence of proofs of loss, writes to the assured that "we don't intend to look any further into the matter, and we don't deny our liability, nor do we admit it," the proof of loss is waived: *Deitz v. Providence etc. Ins. Co.*, 33 W. Va. 526; 25 Am. St. Rep. 908. If proofs of loss are served upon an insurance company and retained without objection, and the company refuses to pay the loss on some other grounds, all further proofs of loss are waived: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121, and note. When an insurer absolutely denies liability for loss, he thereby waives the benefit of the provision in the policy giving sixty days for payment and adjustment of loss: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703.

TREDWAY & RILEY.

[IN KERRASKA, 45.]

CONFLICT OF LAWS — VOID CONTRACT FOR SALE OF INTOXICATING LIQUORS.

— Where a contract for the manufacture and sale of beer in one state to be transported to another is void in the state where made, because prohibited by statute, it is void everywhere, and its invalidity is a good defense in an action on the contract in another state.

INTOXICATING LIQUORS — CONSTRUCTION OF STATUTE FORBIDDING MANUFACTURE OF. — A statute prohibiting the manufacture for sale or sale of intoxicating liquors within the state, except for certain purposes, and then only by persons holding permits, includes the manufacture and sale of beer in that state by a person not having a permit, although it is manufactured and sold there for the sole purpose of being transported to another state.**INTERSTATE COMMERCE, LIQUOR LAW, WHEN NOT REGULATION OF.** — A statute prohibiting the manufacture for sale or sale of intoxicating liquor within the state, except for certain purposes, by persons holding a permit, includes the manufacture and sale of beer within the state by a person not holding a permit, although it is manufactured and sold solely for the purpose of transportation to another state; and such statute is not void as an attempt to regulate interstate commerce.**INTERSTATE COMMERCE, WHEN BEGINS.** — Intoxicating liquor manufactured in one state does not become an article of interstate commerce until received by a carrier for shipment, and until then it is under the jurisdiction and control of the state wherein it was manufactured.

Davis and Gantt, for the appellant.

Jay Brothers and M. C. Beck, for the respondent.

NORVAL, J. This action was brought in the county court of Dakota County, by the plaintiff in error, to recover the sum of \$826.15 on an account for beer sold at Sioux City, in the state of Iowa, by the Franz Brewing Company to the defendant in error. Before suit the account was sold to the plaintiff. The petition is in the usual form.

The defendant answered: —

"1. That he admits that he made a contract for the purchase of beer from the Franz Brewing Company, at the time in the said petition set forth, and that the defendant purchased beer of said brewing company at said times; but as to the amount so purchased, he has no means of determining, and therefore denies that he purchased the amount in the said petition set forth.

"2. Defendant further states, in answer to the said petition, that the contract for the purchase of the beer so sold this defendant was made in the state of Iowa, and the beer was manufactured and sold to this defendant in the said state.

That under the laws of the said state in force at the time the same was sold this defendant, the sale thereof was illegal and contrary to the law, which law is as follows: Section 2360 of the statutes of the state of Iowa, approved April, 1884, and which became a law July, 1884, provides: 'After this act takes effect, no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter, or dispense any intoxicating liquor for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medical purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever, and all permits must be procured as hereinafter provided from the district court.'"

Section 2416 of the said statute provides: "Wherever the words 'intoxicating liquors' occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever, and no person shall manufacture for sale, or sell or keep for sale, as a beverage, any intoxicating liquors, ale, wine, and beer." Approved April, 1884; became a law July, 1884.

"3. That at the time the beer was so purchased by defendant, said Franz Brewing Company had no permit to manufacture or sell intoxicating liquor as the law provided, and the said sale to this defendant as aforesaid was, by the law of the state of Iowa, then and there prohibited, and the sale of the said beer to defendant was illegal.

"4. The defendant cannot be held on said account, for the reasons aforesaid, and the defendant denies each and every allegation in the said petition not otherwise answered."

The plaintiff filed a reply, as follows:—

"1. Admits that the purchase of the beer, the subject-matter of this action, was made from the Franz Brewing Company by said defendant, and that said purchase was made in the state of Iowa.

"2. Plaintiff, further replying to said answer, alleges that at the time of the sale aforesaid, and long previous thereto, and since said dates, the Franz Brewing Company was and is a corporation duly organized and existing under and by virtue of the laws of the state of Iowa, and was carrying on the business of manufacturing and selling beer in said state of Iowa; that the defendant, at the time of said purchase, and

long previous to and since said date, was a resident of the state of Nebraska, and resided in Jackson, Dakota County, in said state, at which town said defendant was engaged in the business and occupation of keeping a saloon for the vending of retail malt, vinous, and spirituous liquors, under and by virtue of the laws of said state of Nebraska, and at all of the hereinafter mentioned times said defendant was carrying on said business of saloon-keeping, or vendor of malt, spirituous, and vinous liquors, in said town of Jackson, county and state aforesaid, under a license duly issued under and by virtue of the laws of said state of Nebraska.

“Plaintiff alleges that at the time of the sale of beer made by the Franz Brewing Company to said defendant, said brewing company knew that said defendant was a non-resident of the state of Iowa, and a resident of the state of Nebraska, and doing business in the town of Jackson, in said state, under a license duly issued in compliance with the laws of said state, and knew that said defendant was legally and rightfully carrying on the business of a retail dealer in malt, spirituous, and vinous liquors at said place.

“Plaintiff alleges that the sale of beer made to defendant was made, as alleged, in the state of Iowa, but that the same was made for the purpose, and with the intention and understanding, that the same was to be shipped to said defendant at his place of business in Jackson as aforesaid, and there to be retailed by defendant in said saloon, and under and by the authority of his license to vend and retail the same in said town of Jackson and state of Nebraska.

“Plaintiff alleges that, in compliance with said agreement so made, said Franz Brewing Company did ship to defendant large quantities of beer, and said defendant, at various times, paid different sums of money on account of same, until said Franz Brewing Company went out of the business of manufacturing the same, at or about which time there was an account stated between defendant and the Franz Brewing Company, and there was found due said corporation, as a balance on beer so sold and shipped to defendant, the sum of \$826.15, as alleged in plaintiff's petition, and which sum was duly assigned to plaintiff before the commencement of this action, for a valuable consideration.

“Plaintiff further alleges that all of the beer sold to defendant was sold under said agreement that same should be retailed by said defendant in said town of Jackson, county of

Dakota, and state of Nebraska, and all of the same shipped to defendant at said place, and there sold by him under and by virtue of the laws of the said state of Nebraska, and none of said beer was sold or retailed by said defendant contrary to the laws of the state of Nebraska, or that of the state of Iowa.

"Plaintiff further alleges that sales of malt, spirituous, and vinous liquors made in the state of Iowa, to be used and disposed of in the state of Nebraska in accordance with the laws of said state, are legal and valid sales, and are recognized as such, and enforced by the courts of the state of Iowa."

The defendant filed a general demurrer to the reply, which was sustained by the court, and judgment was rendered dismissing the action. On error to the district court, the judgment of the county court was affirmed. The plaintiff brings the case here for review by petition in error.

It is admitted by the pleadings that the beer, for the recovery of the price of which this action was brought, was manufactured by the Franz Brewing Company, and sold and delivered to the defendant in error within the state of Iowa. It is contended that the manufacture and sale were in violation of the laws of that state, and therefore no recovery can be had in this state.

By reference to the sections of the statute of the state of Iowa in force at the time the beer in question was sold, which are copied into the answer, we find that the manufacture and sale of all intoxicating liquors within the state of Iowa is expressly prohibited, except for pharmaceutical, medical, chemical, or sacramental purposes. And it can only be legally manufactured or sold for the four specified purposes by persons holding permits issued by the proper authority. It is alleged in the answer, and not denied by the reply, that at the time the beer was purchased the Franz Brewing Company had no permit to manufacture or sell intoxicating liquors. Moreover, it appears from the allegations of the reply that the beer in question was sold in Iowa for none of the purposes expressly permitted or authorized by the laws of that state. The sale was therefore illegal, unless, as is claimed by counsel for the plaintiff, the manufacture and sale of intoxicating liquors within that state, for the sole purpose of transportation and sale out of that state, infringes no law or statute of the state of Iowa. It will be observed that none of the sections of the code of that state pleaded in the answer contain any provision which can be construed to exempt from their operations

intoxicating liquors manufactured or sold in that state, with the intent and for the purpose of being transported to another state to be there sold. The statute, in express terms, forbids all sales within the state of intoxicating liquors manufactured there, except for the four purposes already mentioned. Liquors sold there by a person not holding a permit, to be transported to another state, are within the scope of the law.

It is contended by counsel for the plaintiff, if the statute receives the construction which we have given it, then the law conflicts with section 8 of article 1 of the constitution of the United States by undertaking to regulate commerce between the states. The section provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states," etc.

Laws regulating and prohibiting the manufacture and sale of intoxicating liquors are regarded as police regulations, passed for the prevention of idleness, drunkenness, pauperism, and crime. While such laws affect commerce, they have not been regarded as a regulation of commerce, within the meaning of the constitutional provisions quoted above. So under the police powers, states have passed quarantine and health laws, and laws preventing the importation into a state of diseased cattle, and the sale of unwholesome food. While such laws, to some extent, regulate commerce between foreign countries and between the states, they are not for that reason invalid. As was observed by Mr. Justice McLean in the license cases, 5 How. 589: "The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded, and in extreme cases it may be thrown into the sea. This comes in direct conflict with the regulation of commerce, and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed of man in his individual capacity. . . . From the explosive nature of gun-powder, a city may exclude it. Now, this is an article of commerce, and is not known to carry infectious diseases; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclu-

sive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the state."

Although a state has the power to regulate or prohibit the sale of intoxicating liquors within its borders, it cannot restrict their importation into or through the state, nor their exportation out of the state, nor prohibit the sale of imported liquors in the original packages, or vessels in which they were shipped. That would clearly be the regulation of commerce proper, which power is conferred exclusively upon Congress. Nor can a state, under the guise of police powers, regulate interstate commerce. The Iowa statute does not undertake to prevent the transportation of intoxicating liquors from that to any other state, nor to prohibit their sale out of the state. It only restricts their manufacture and sale within the state of Iowa. The sale of the liquors was not forbidden by reason of their transportation or intended transportation, but the same restriction is placed by the legislature upon the sale of all liquors within the state. No regulation of commerce between the states is attempted. The liquors were manufactured in Iowa, and at the time of their sale were not in process of transportation to this or any other state. They had not yet become interstate commerce. Had such been the case, the state would have been powerless to have forbidden their sale while in the original packages. The fact that it was the intention of the defendant to ship the liquors to this state is quite immaterial. Such intention and purpose could not alone have the effect to make the liquors interstate commerce. They did not become such until received by the carrier for shipment. Until then they were under state jurisdiction and control. The supreme court of the United States, in the case of *The Daniel Ball*, 10 Wall. 565, properly said: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

The same doctrine was affirmed by the same court in the later case of *Coe v. Town of Errol*, 116 U. S. 517. In that case the authorities of the state of New Hampshire assessed for taxation certain logs which had been cut in that state and hauled to the town of Errol, in the same state, for the purpose of transportation to the state of Maine. The logs were held at Errol by the owner for a convenient opportunity for shipment.

The court, in an exhaustive opinion by Mr. Justice Bradley, held the tax valid. We quote from the opinion: —

“ Does the owner's state of mind in relation to the goods — that is, his intent to export them, and his partial preparation to do so — exempt them from taxation? This is the precise question for solution. This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water, or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then, it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state. . . . Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner because of their anticipated departure, they might

well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

It logically follows from the reasoning of the court in the foregoing case that the liquors in controversy were not interstate commerce when sold, and are subject to the police powers of the state.

Counsel, in the brief of plaintiff in error, say: "The defendant was violating no law of Nebraska in going to Iowa and making this contract, and the corporation was violating no law of Nebraska in selling this beer to be used there." This is true, but the invalidity of the sale is placed upon the ground that the brewing company violated the laws of Iowa, and not of Nebraska, in making the sale. The sale, in law and in fact, was made in Iowa, notwithstanding it was purchased for the purpose of transportation out of the state. These liquors were manufactured in violation of the law of Iowa, and having no lawful existence, how can it be said that they were the subject of lawful commerce?

The decisions cited by plaintiff in error are not analogous to the case before us, as a cursory examination will show.

In *Bowman v. Chicago etc. R'y Co.*, 125 U. S. 465, the only question before the court was the validity of a statute of Iowa prohibiting common carriers from bringing intoxicating liquors into the state from another state without first procuring a certificate from a public officer of Iowa to the effect that the person to whom the liquors are consigned had authority under the laws of that state to sell the same. The court held the prohibition of the transportation of liquors from another state under the restrictions imposed by the statute was not the exercise of the police power of the state, but was the regulation of interstate commerce, and was therefore in violation of the constitution of the United States. It is manifest that the statute considered by the court in that case attempted to regulate commerce between the state of Iowa and the other states. The statute we are considering in this case is not of that character. It only attempts to regulate commerce within the state.

The constitution of Colorado, and a statute passed by the legislature of that state, prohibits a foreign corporation from transacting business in Colorado, until it has filed a certificate, signed and acknowledged by its president and secretary,

designating its principal place of business and appointing an agent on whom service of summons could be made. A corporation of Ohio, without filing such certificate, made a contract in Colorado with a citizen of that state to manufacture and deliver some farm machinery. The goods were made and delivered, and in a suit brought by the corporation for a breach of the contract the defendant pleaded as a defense the failure of the plaintiff to comply with the provisions of the constitution and statute. In *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, the court held that the state of Colorado could not prohibit the plaintiff from selling in that state, by contract made there, its machinery manufactured in another state, on the ground that it was a regulation of interstate commerce.

In *Leisy v. Hardin*, 135 U. S. 100, it was held that the citizen of one state has the right to import beer into another state, and sell it there in its original packages; that until sold by the importer it is not subject to state regulations, and that a state law which forbids the sale of an imported article by the importer, in unbroken packages, is a regulation of commerce between the states, and void. The theory of that decision is, that commerce between the states does not cease until the imported article is mingled with and becomes a part of the general property of the state, by sale at the place where the transportation terminates. The courts do not undertake to state at what point of time an article becomes interstate commerce, as does *Coe v. Town of Errol*, 116 U. S. 517.

The cases most nearly in point are *Pearson v. International Distillery Co.*, 72 Iowa, 348, and *Kidd v. Pearson*, 128 U. S. 1, cited in the brief of the defendant. In the Iowa case, the action was brought to abate, as a nuisance, a distillery located in that state, used for the unlawful manufacture and sale of intoxicating liquors, and to enjoin the owner from their manufacture and sale. It appears that the liquors were manufactured solely for the purpose of transportation and sale out of the state, and no sales were made, or intended to be made, within the state. The action was sustained. The court, in the *syllabus*, say: —

“1. The manufacture for sale of intoxicating liquors as beverages is prohibited within the state of Iowa by code, section 1523; notwithstanding that the liquor was manufactured only for exportation, and was not sold or intended to be sold within the state.

“2. The only intoxicating liquors which may be manufac-

tured, sold, or kept for sale within the state of Iowa are those manufactured in the state for mechanical, medicinal, culinary, or sacramental purposes, or imported for sale under the authority of the laws of the United States, and remaining in the original packages and quantities in which they were imported.

“3. The Iowa statute prohibiting the manufacture or sale of intoxicating liquors, even for exportation, unless manufactured within the state for mechanical, medicinal, culinary, or sacramental purposes, and prohibiting, also, the sale of imported foreign intoxicating liquor, unless in its original packages and quantities, is not in conflict with the exclusive right of Congress to regulate interstate commerce, and is therefore constitutional.”

The case was taken on error to the supreme court of the United States, where, in *Kidd v. Pearson*, 128 U. S. 1, the judgment of the state court was affirmed. The conclusion we have reached is, that the manufacture and sale of the beer in question were prohibited by the code of Iowa. The contract and sale being illegal and void when made, such invalidity is a complete defense in an action upon a contract here. That the law of a place where a contract is made governs as to the right of action is too well settled to require the citation of authorities. The judgment is affirmed.

SALES — BY WHAT LAW GOVERNED. — Where a defendant ordered, by sample, spirituous liquors of the agent of a firm in a state where the sale was lawful, and they were shipped from the firm's place of business, it was held that the contract was complete at the place of shipment, and being lawful there, could be recovered on in the state to which the goods were shipped: *Boothby v. Plaister*, 51 N. H. 436; 12 Am. Rep. 140, and note; *Tegler v. Shipman*, 33 Iowa, 194; 11 Am. Rep. 118, and note. But when a dealer, in Ohio, received, in Michigan, an order for liquors which were afterwards shipped in Ohio and delivered in Michigan, it was held to be a sale in Michigan, and invalid under a statute rendering void all sales or contracts relating to liquor: *Webber v. Howe*, 36 Mich. 150; 24 Am. Rep. 590, and note. Laws prohibiting the sale of liquors in New Hampshire cannot extend to sales made in another state, in which state such sales are lawful, where the sale is complete in the latter state: *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617, and note. See extended note to *Winslow v. Fletcher*, 55 Am. Rep. 129-149.

INTERSTATE COMMERCE — WHEN BEGINS. — From the moment that an article of commerce commences to move from one state to another, it becomes the subject of interstate commerce, and, as such, can be controlled only by national legislation: *Bennett v. American Express Co.*, 83 Me. 236; 23 Am. St. Rep. 774, and note.

HEPLER v. DAVIS.

[82 NEBRASKA, 556.]

JUDGMENT — REVIVOR — STATUTE OF LIMITATIONS. — Where a judgment recovered in one state is there revived against the defendant, without jurisdiction of his person, and after his removal to another state, such revivor will not prevent the running of the statute of limitations against the revived judgment in the latter state.

Billings and Billings, for the appellant.

F. B. Donisthorpe, for the respondent.

MAXWELL, J. In January, 1879, the plaintiff recovered a judgment against the defendant in the state of Illinois, the defendant being personally served with summons. Soon after the recovery of the judgment, the defendant removed to this state, and has continued to reside here to the present time. On the 12th of October, 1888, the judgment in Illinois was revived in that state, without jurisdiction of the person of the defendant. In December following, this action was brought in the district court of Fillmore County upon the judgment so alleged to have been revived. On the trial of the cause the court found as follows: —

“That on the seventh day of January, 1879, plaintiff recovered judgment against the defendant in the circuit court of Livingston County, Illinois, on personal service, said court being a court of general jurisdiction, for the sum of \$130.65 and \$49.25 costs of suit, together with interest at six per cent per annum, in an action then pending in said court between said parties; that on the twelfth day of November, 1888, said plaintiff obtained a judgment of revivor in said court as by the law of said state provided, which said law is as follows, viz.: —

“‘Sec. 27. *Scire facias*. — It shall not be necessary to file a declaration in any *scire facias* to revive a judgment or foreclose a mortgage in any court of record in this state. And in any such case of *scire facias* to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of the court out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the state, or is concealed within the state so that process cannot be served on him, and stating the place of residence of such defendant, if known, or that, on due inquiry, his place of residence cannot be ascertained, then in such case notice to the defendant may be given by publication and mail in the same manner as is provided by

statute for notice in like cases in chancery': Ill. Rev. Stats. 1883, c. 110.

" ' Sec. 25. *Revival of judgment by scire facias.* — Judgment in any court of records in this state may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after date of such judgment, and not after': Ill. Rev. Stats. 1883, c. 83.

" ' Sec. 12. *Notice by publication, etc.* — Whenever any complainant or his attorney shall file in the office of the clerk of the court in which his suit is pending an affidavit showing that any defendant resides or hath gone out of this state, or on due inquiry cannot be found, or is concealed within this state so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper printed in his county, and if there be no newspaper published in his county, then in the nearest newspaper published in this state, containing notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section shall be evidence': Ill. Rev. Stats. 1883, c. 22.

" That no personal service of notice was had of said proceedings upon said defendant, who then, and now, and for eight years last past has continually been a resident of Fillmore County, Nebraska, and he had no notice or knowledge in any manner of said proceedings.

" It is therefore considered by the court that said cause of action did not accrue within five years next before the commencement of this action, and is therefore barred by the statute of limitations, and that the plaintiff's cause of action be and the same is hereby dismissed."

In *Packer v. Thompson*, 25 Neb. 688, the plaintiff in error had removed from Iowa to this state after a judgment had been recovered against him in that state. Eight years afterwards, he returned to Iowa on a visit, when he was personally served with a conditional order of revivor, and the action afterwards revived. An action was thereupon brought on the revived judgment in this state, and the action was sustained.

That case, however, differs materially from this. The judgment rendered in Illinois had no extraterritorial force. If it is sought to collect it in this state by due course of law, an action must be brought thereon and service had upon the defendant, and a defense, such as payment, release, the statute of limitations, etc., is available.

An action upon a foreign judgment must be brought within five years, or it will be barred; and the judgment of a sister state is, within the meaning of the statute of limitations, a foreign judgment. Neither did the alleged revivor, there being neither an appearance by nor service on the defendant, remove the bar of the statute, as the writ could have no effect beyond the limits of the state where issued. The bar of the statute of limitations, therefore, was not removed by the attempted revivor, and the action is barred. The judgment is right, and is affirmed.

JUDGMENT — VOID FOR WANT OF JURISDICTION — EFFECT OF. — Without jurisdiction, no judgment can be entered under which any rights can be lost or acquired: *Great West Mining Co. v. Woodmas etc. Mining Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note; *Bean v. Loryea*, 81 Cal. 151; *Glaude v. Peat*, 43 La. Ann. 161. If a court of general jurisdiction undertakes to grant a judgment in a proceeding where it has no jurisdiction of the parties or the subject-matter of the action, and this appears from the record, the judgment is absolutely void, and will be disregarded and treated as a nullity everywhere: *Brickhouse v. Sutton*, 99 N. C. 103; 6 Am. St. Rep. 497, and note.

SCHRE FACIAS TO REVIVE A JUDGMENT: See extended note to *Frison v. Harris*, 94 Am. Dec. 223.

GERMAN INSURANCE COMPANY v. FAIRBANK.

[32 NEBRASKA, 750.]

INSURANCE — ENTIRETY OF. — When an insurance policy covers a dwelling and various classes of personal property, describing them separately, and specifies different and separate amounts on the dwelling and each kind of personalty, the execution of a mortgage on the real estate, in violation of a condition against subsequent encumbrances on any of the property insured, is no defense to an action for the loss of the personalty not encumbered.

INSURANCE OF PERSONALTY — WHEN SEPARABLE. — When an insurance policy describes different classes of personal property insured for separate and distinct amounts, a violation of a condition in the policy against subsequent encumbrances, by the execution of a chattel mortgage on one class of the property, will not prevent a recovery for the loss of the other and unencumbered class.

INSURANCE — ACTION — LIMITATION. — When an insurance policy requires notice and proof of loss to be furnished within thirty days and action to

be commenced within six months after the loss, and provides that the insurer will pay the loss within ninety days after notice and proofs of loss have been received at the company's home office, the statute of limitations begins to run against the cause of action only from the expiration of the ninety days, and the suit may be commenced at any time within six months therefrom.

INSURANCE — PROOF OF LOSS. — If an insurance policy requires that proof of loss must be made within thirty days thereafter, the insured must prove that such stipulation has been complied with, or that it has been waived by the company.

James R. Wash, and Adams, Lansing, and Scott, for the appellant.

Charles Kilburn and Charles H. Tanner, for the respondent

NORVAL, J. This is a suit upon a policy of insurance against loss or damage by fire, lightning, tornado, and wind-storms, to recover for the loss of a cow covered by the policy. There was judgment in the court below for the plaintiff, in the sum of \$32.50 and costs.

The case as made by the plaintiffs was, that on the twelfth day of January, 1888, the cow was violently blown upon a barbed wire fence and killed. There is no conflict in the evidence, either as to the manner of the loss or the amount of the damages. The insurance company contends that the plaintiff cannot recover, because he has violated certain stipulations of the policy.

The policy was for the amount of \$1,150, of which \$450 was on dwelling, household furniture, beds and bedding, wearing apparel, and sewing-machine; \$300 was on horses and cattle, not exceeding \$100 on any one horse, and not exceeding \$30 on any one cow; and the balance of the risk was upon other personalty.

The policy upon which the action was brought provides, among other things, that "if there is or shall be other prior, concurrent, or subsequent insurance (whether valid or not) on said property, or any part thereof, without the company's consent hereon, or if said buildings, or either of them, is or shall become vacant or unoccupied, or if the hazard shall be increased in any way, or if the property or any part thereof shall be sold, conveyed, encumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof whatever, or if any foreclosure proceedings shall be commenced, or if the interest of the insured in said property, or any part thereof, now is or shall become any

other or less than a perfect legal title and ownership, free from all liens whatever, except as stated in writing hereon, or if the buildings, or either of them, stand on leased ground or land of which the assured has not a perfect title, or if this policy shall be assigned without the written consent hereon, then and in every such case this policy shall be absolutely void."

One of the defenses presented by the answer is, that the insured, in violation of the above condition of the policy, after the same was issued, but before the loss, and without the knowledge and consent of the company, executed and delivered two mortgages upon the farm on which is situated the dwelling covered by the policy. On the trial the plaintiff in error offered these mortgages in evidence, which were excluded by the court. This ruling is assigned as error.

The precise question here presented was before the court in *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696. It was there held that where an insurance policy covers a dwelling and various classes of personal property, describing them separately, and specifies different and separate amounts on the dwelling and each kind of personalty, the execution of a mortgage on the real estate, in violation of a condition against subsequent encumbrances on any of the property insured, is no defense to an action for the loss of the personalty not encumbered. The authorities cited in the brief of the defendant in error in that case sustained the same doctrine. We are satisfied with the reasoning of the opinion, and the decision is adhered to.

The policy having specified separate and distinct amounts upon the different subjects of insurance, the contract is severable, and a breach of a condition of the policy against encumbrances could only affect that class of property which was covered by the encumbrance. The execution of the mortgages upon the lands therefore only avoided the policy so far as it covered the buildings, and did not in any manner affect the insurance upon the cattle.

The plaintiff in error, for the purpose of showing that the insured had violated the above provisions of the policy, offered in evidence a chattel mortgage executed on January 18, 1887, by the defendant in error to P. H. Passey, administrator, covering several head of horses. The mortgage was ruled out by the court, and an exception was taken by the plaintiff in error. There is no claim that there had ever been any en-

cumbrance during the life of the policy upon the cow that was killed, or upon any of the cattle owned by the insured. The ruling of the trial court is within the decision in *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696. The policy in that case, like the one before us, was not upon specific personal property. There some of the personalty insured had been mortgaged subsequent to the execution of the policy. Chief Justice Reese, in the opinion, says: "Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us; but we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned, during the time of the existence of the title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense."

No specific stock is described in the contract, but it simply specifies three hundred dollars on horses and cattle, limiting the amount on each animal. By the terms of the policy, if the loss on cattle equaled three hundred dollars, it is perfectly clear that the insured would have been entitled to recover that sum. Had he sold the horses it would not have affected the insurance on the cattle. The fact that they were encumbered did not affect or render less valuable the title of the insured in the cattle, nor was the risk on the cattle thereby increased. It cannot be successfully claimed that the hazard of wind-storms was increased by the encumbrance of the property. There was no error committed in refusing to allow the chattel mortgage to be received in evidence.

There is another reason why the chattel mortgage was properly excluded. The answer alleges that the insured executed a mortgage "on January 18, 1887, to P. H. Passey, for the sum of \$250." The chattel mortgage offered in evidence was made by Warren Fairbanks and Loren Fairbanks to P. H. Passey, as administrator, and not to him in his individual capacity, as alleged in the answer. There was therefore a variance between the allegations and the instrument offered, both as to the name of the mortgagor and mortgagee. The proofs must correspond with the issues made by the pleadings.

It is insisted that the action is barred by the terms of the policy. It contains this provision: "It is mutually agreed:

that no suit or action against this company upon this policy shall be sustained in any court of law or equity, unless commenced within six months after the loss or damage shall occur, and if any suit or action shall be commenced after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The petition alleges, and the proofs show, that the loss occurred January 12, 1888. The suit was begun before the justice of the peace September 27, 1888, or eight months and a half after the cow was killed. If the condition of the policy above quoted stood alone, and was within the contemplation of the parties when the contract was entered into, then, doubtless, the failure of the plaintiff to commence his action within six months after the loss would operate as a bar to the action. But a contract of insurance, like all other contracts, must be construed so as to give effect, if possible, to all its provisions. This policy provides that written notice of the loss or damage must be immediately given, and within thirty days the claimant must furnish proofs thereof. It is also stipulated that "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid ninety days after notice and due and satisfactory proofs of the same shall have been made by the assured and received at the company's home office at Freeport, Illinois."

It will be observed that by the above condition of the policy the plaintiff in error did not become liable to pay the loss until ninety days after the making of the proofs of loss. The money was not due and the holder of the policy could not have lawfully demanded payment until that time had elapsed. No suit, therefore, could have been commenced prior to the expiration of ninety days after the loss, and it is well settled that the period of limitation will not commence to run until the cause of action accrues. The fair and reasonable interpretation of the provisions of the policy, when construed together, is, that the limitation of six months did not begin to run from the date of loss, but from the time the suit could have been brought. It does not appear in evidence when the proofs were made, nor in fact that they were ever furnished; but as suit was instituted within six months from the time it could have been commenced, had proofs been made on the day the loss

occurred, the action was not barred. This construction is well sustained by the authorities: *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *McConnell v. Iowa Mut. Aid Ass'n*, 79 Iowa, 757; *Matt v. Iowa Mut. Aid Ass'n*, 81 Iowa, 135; 25 Am. St. Rep. 483; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 241; 33 Am. Rep. 607; *Killips v. Putnam Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506.

The remaining ground for reversal is, that there is no evidence that the plaintiff ever made proofs of loss. The petition alleges that they were furnished to the company, which allegation is denied by the answer. No testimony was produced on the trial, by either party, on that branch of the case. Quite likely the omission was an oversight on the part of the plaintiff. The policy requires that proofs be made within thirty days after the loss, and it was incumbent upon the plaintiff to establish on the trial that this stipulation was complied with, or that the company waived the same. If the plaintiff relies upon a waiver of the provision, it should be pleaded.

For the failure to prove on the trial that proofs of loss were made, the judgment is reversed, and the cause remanded for further proceedings.

INSURANCE — ENTIRETY OF CONTRACT — FORFEITURE AS TO PART. — A fire insurance policy for which a gross premium is paid, which covers real estate and various classes of personal property, the latter not specifically named, is not entire, and though a mortgage be given on the real estate in violation of a condition in the policy, it will not bar a recovery on the personal property: *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696, and note; see note to *Phoenix Ins. Co. v. Pickel*, 12 Am. St. Rep. 402.

INSURANCE POLICY — LIMITATION OF TIME TO SUE ON. — A condition that no action shall be sustainable unless commenced within six months after a loss occurs is to be construed in connection with another condition, that the payment of losses shall be made in sixty days from the date of the adjustment of the proofs of loss. Thus construed, the limitation of six months does not begin to run until sixty days from the date of said adjustment: *Mayor v. Hamilton etc. Ins. Co.*, 39 N. Y. 45; 100 Am. Dec. 400, and note; *Ohandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Steen v. Niagara etc. Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297. The contrary doctrine — that is, that the time of limitation commences to run from the date of the loss — is maintained in *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870, and note; *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; 50 Am. Rep. 1, and note.

INSURANCE — ACTION ON POLICY — BURDEN OF PROOF. — In an action on a fire insurance policy, proof on the part of the insurer of the existence of a condition of things imposing a certain duty upon the insured casts upon the latter the burden of proving a compliance with such duty: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460, and note with cases collected.

COAD v. HOME CATTLE COMPANY.

[32 NEBRASKA, 761.]

CONFLICT OF LAWS — PLACE OF CONTRACT, WHAT IS. — A note dated and executed in one state, where both the maker and payee reside, and where, by its terms, it is made payable, is presumed to be a contract entered into and to be performed in that state, although it is secured by mortgage on property in another state, where it was delivered, and where the money constituting the loan was paid over.

CONFLICT OF LAWS — INTEREST. — When a contract is made in one state, to be performed in another, and the legal rate of interest is higher in one state than in the other, the parties may in good faith stipulate for the higher rate of interest, without incurring the penalties of usury in either state.

CHATTEL MORTGAGE — OPTION TO FORECLOSE. — When a chattel mortgage provides that upon default in the payment of interest for the space of three days after maturity, the whole debt shall become due and payable, at the option of the mortgagee, he may declare the whole debt due, and bring an action to foreclose for such default in the payment of interest.

CHATTEL MORTGAGE — NOTICE OF POSTPONED SALE. — If a chattel mortgage sale is postponed, notice of such postponement, when a newspaper is published in the county where the sale is to take place, and the postponement is for sufficient time to permit, must be published in the paper in which the original notice of sale was given, and must be continued therein in each issue of the paper until the day of sale.

CHATTEL MORTGAGE — SALE ON INSUFFICIENT NOTICE — LIABILITY OF MORTGAGEE. — A mortgagee of chattels must comply substantially with the requirement of the statute, including notice of sale, in foreclosing his mortgage, and if he fails to do so, and the property is sold for less than its value, the mortgagor is entitled to have the value of the property applied to the extinguishment of the debt, and if such value is greater than the mortgage debt, the mortgagee is liable to the mortgagor for the difference.

APPEAL. — **OBJECTION NOT MADE IN TRIAL COURT** will not be considered on appeal.

John C. Cowin, Heist and Raynor, Thomas Kane, and W. C. Reilly, for the appellants.

F. I. Foss, for the respondent.

NORVAL, J. This suit was brought by the appellee in the district court of Cheyenne County to foreclose a real estate mortgage executed by the Home Cattle Company. The State Bank of Sidney, being a subsequent mortgagee, was joined as party defendant.

The court found that there was due the plaintiff on his note and mortgage the sum of \$6,339.07, and that the same was a first lien on the real estate mentioned in the petition. The court also found that there was due the State Bank of Sidney,

on its mortgage from the Home Cattle Company, the sum of \$6,208, and the same was a second lien. A decree of foreclosure and sale was rendered, from which the defendants appeal.

On the twenty-eighth day of April, 1883, the Home Cattle Company was incorporated under the laws of the territory of Wyoming, with authority to carry on a general live-stock business in the territories of Wyoming, Montana, and Dakota, and in the states of Colorado and Nebraska, with its principal place of doing business at Cheyenne, Wyoming. Subsequently, the company acquired property in Cheyenne County, Nebraska, where most of the business of the company was transacted, and where the greater portion of its property was situated.

On the nineteenth day of August, 1884, the appellee loaned the Home Cattle Company twelve thousand dollars, for which amount it executed a promissory note, due November 1, 1886, payable to M. M. Coad at the banking-house of Morton E. Post & Co., Cheyenne, Wyoming, drawing interest at fifteen per cent per annum from date. The interest was made payable semi-annually at said bank. To secure the payment of the note, the proper officers of the company executed and delivered the real estate mortgage in suit, and a chattel mortgage upon all of the personal property owned by the company.

One of the defenses presented by the answer of the Home Cattle Company is usury. That the full amount for which the note was given was paid by the plaintiff is not denied. But the appellants insist that the loan was made in this state, and as the note specifies on its face a higher rate of interest than is allowed by the laws of Nebraska, the contract is usurious. The plaintiff contends that this was a Wyoming contract, and is not governed by the laws of Nebraska. It is conceded that the note is not usurious under the laws in force in Wyoming at the date of its execution.

At and prior to the making of the loan, the plaintiff was a resident of Cheyenne, Wyoming. The board of directors of the Home Cattle Company held a meeting at Cheyenne on the eighteenth day of August, 1884, at which the following resolution was adopted:—

“Resolved, That the company borrow the sum of twelve thousand dollars (\$12,000), giving its note therefor, payable on November 1, 1886, with interest at the rate of fifteen per cent per annum, the interest to be payable at the end of each and every six months, the said note and interest thereon to be secured by a mortgage upon the company's property, both

personal and real; and the president and secretary are hereby authorized and empowered to execute and sign for the company such note and mortgage, and that said money be used in the payment of the debts of said company, some of which are in judgment against the company, and others are long overdue accounts, surplus, if any, to be applied to the proper purposes for which the company was organized."

In accordance with this resolution, the proper officers of the company, on the nineteenth day of August, in the city of Cheyenne, Wyoming, executed the note and mortgages, the note being dated and payable in Cheyenne. The plaintiff, desiring to look over the property, and also to examine the records of Cheyenne County, Nebraska, for the purpose of ascertaining whether there were any liens against the property, the money was not paid out on the loan until six days later. On August 25th, Mr. Coad examined the records at Sidney, Nebraska, and finding the property free from encumbrances, he gave Thomas Kane, the president of the company, his check for twelve thousand dollars, on either a Cheyenne or Omaha bank, and the note and mortgages were delivered to the plaintiff at the same time in Sidney.

The facts, so far as we have stated them, are not disputed by the testimony. It is, however, contended by the appellants that the contract for the loan was made between the plaintiff and Thomas Kane, the president of the company in this state, prior to the meeting of the board of directors in Cheyenne, and that it was further agreed the note should be executed and made payable in the city of Cheyenne, so that the contract might draw interest at fifteen per cent per annum, instead of the highest rate allowed by the laws of this state, and that said agreement was made for the sole purpose of evading the usury laws of Nebraska. This was denied by the plaintiff when upon the witness-stand. That the note in suit appears on its face to have been executed in Wyoming, and by its terms is payable there, that the maker of the note is a Wyoming corporation, and that the plaintiff, at the time of the making of the loan, and both prior and subsequent thereto, resided in Cheyenne, Wyoming, raise a strong presumption that the contract was made in Wyoming, where the rate of interest specified in the note is lawful, and not that the parties entered into the contract in this state, where the stipulated rate of interest is unlawful. And this presumption will prevail until overcome by clear and satisfactory proof that the contract was

made here, and that the note was signed in Wyoming, and was dated and made payable there, as a device for securing usurious interest. Whether the transaction was intended as a means to defeat the usury laws of this state is a question of fact to be determined from the evidence. The trial court found that the contract was made in Wyoming, and upon a careful consideration of the case, we are satisfied that the evidence fully sustains the finding, and that the transaction was *bona fide*. There is evidence in the bill of exceptions tending to show that the agreement for the loan was made in Wyoming, and the fact that the note was delivered and the money paid over in this state would not alone make the note a Nebraska contract. It was competent for the parties to adopt the laws of Wyoming, provided they did so in good faith, and not for the purpose of evading the usury laws of this state: *Brown v. American Finance Co.*, 31 Fed. Rep. 516; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Townsend v. Riley*, 46 N. H. 300; *Miller v. Tiffany*, 1 Wall. 298.

In the case last cited the court says: "The general principles in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character."

The parties having in good faith agreed upon a rate of interest which was lawful at the place where the agreement was to be performed, the contract is valid.

It is urged that the suit was prematurely brought. It was commenced October 23, 1886, while the principal sum, secured by the mortgage, was not due, by the terms of the note, until November 1st. The mortgage sought to be foreclosed contained this provision: "And it is hereby further provided that in case any installment of principal, or any part thereof, or any interest money, or any part thereof, hereby secured to be paid shall remain due and unpaid for the space of three days

after the same shall, by the terms thereof, become due and payable, that then and in that case the whole principal sum hereby secured to be paid, together with the interest thereon, shall, at the option of the said party of the second part, his executors, administrators, or assigns, become due and payable forthwith, anything herein or in said note contained to the contrary notwithstanding."

The evidence shows that four interest payments had fallen due, and not a cent had been paid upon the note. After there had been four defaults of interest payments, the plaintiff exercised his option to declare the whole debt due by taking possession of the personal property under the chattel mortgage, which contained a provision similar to the stipulation in the real estate mortgage quoted above. The chattels were sold, the proceeds applied upon the note, and afterwards this suit was brought. The mortgagor being in default, the plaintiff, under the stipulations in the mortgages, had a right to declare the whole debt due, and commence foreclosure proceedings: *Pope v. Hooper*, 6 Neb. 178; *Fletcher v. Daugherty*, 13 Neb. 224; *Lowenstein v. Phelan*, 17 Neb. 429. Before the bringing of this suit the plaintiff brought an action of replevin against the defendant, and under the writ obtained possession of all the mortgaged chattels which could be found. The defendant was thereby as fully advised that the plaintiff exercised his option to declare the principal sum due as if formal notice of his election had been given.

It is next contended that the chattel mortgage sale is void on account of the failure to give the statutory notice of the time and place of sale, and for that reason the defendant is entitled to a credit on the note for the value of the chattels taken under the mortgage, instead of the amount realized at the chattel mortgage sale.

The first notice of the chattel mortgage sale was published in the Sidney Democrat on the twentieth day of August, which fixed the day of sale on the ninth day of September, 1886. For some cause, probably for the reason that less than twenty days intervened between the publication and day fixed for the sale, the notice was corrected in the issue of the paper of the next week by changing the day of sale to September 18th, which notice was published for three successive weeks. On the seventeenth day of September, the same notice, with the addition that the sale was adjourned to September 30th, appeared in the issue of the same paper. On the twenty-fourth

day of September, the day on which the paper was regularly issued, no notice of said sale nor its adjournment was published or given. On the first day of October, the notice of sale was again published in said newspaper, with a notice that the sale was adjourned until October 20th. This notice was published in each issue of the paper prior to October 20th, at which date the sale took place. There appears to have been good and sufficient reason for the frequent adjournments of the sale. When the notice of sale was being given, the property, consisting chiefly of cattle and wild, unbroken horses, was running at large upon the range, and owing to the inability of the mortgagee to collect the stock together in time, the sale was postponed. But, as already stated, notice of the postponement of the sale, for some cause not disclosed by the record, was not published each week until the day of sale, but was omitted from the issue of the paper of September 24th.

Section 3 of chapter 12 of the Compiled Statutes, relating to foreclosure of chattel mortgages, provides that "notice that such mortgage will be foreclosed by a sale of the mortgaged property, or some part thereof, shall be given as follows: By advertisement published in some newspaper printed in the county in which such sale is to take place, or in case no newspapers are printed therein, by posting up notices in at least five public places in said county, two of which shall be in the precinct where the mortgaged property is to be offered for sale, and such notices shall be given at least twenty days prior to the day of sale."

Section 4 prescribes what the notice shall contain.

Section 5 provides that "such sale may be postponed from time to time by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which such sale is to be had, by posting a notice of such adjournment in some conspicuous place at the place designated in the original notice posted for said sale to be had."

The language of section 5 is clear and explicit, to the effect that where a chattel mortgage sale is adjourned, notice of such postponement, in case a newspaper is published in the county where the sale is to take place, and the adjournment is for sufficient length of time to permit, must be published in the paper in which the original notice of sale was given, and be continued therein in each issue of the paper until the day of

sale. The provisions of the statute relating to foreclosure of chattel mortgages are mandatory, and must be followed, unless waived by the mortgagor. If the mortgagee can disregard the directions of the statute by omitting to give notice of the postponement of a sale for one week, he can, with equal propriety, omit all notice of sale. The mortgagor has an equity of redemption in the mortgaged chattels, and to extinguish the same the mortgagee must comply substantially with the requirements of the statute. If he fails so to do, and the property is sold for less than its value, the mortgagor is entitled to have the value of the property applied to the extinguishment of the debt, and if such value is greater than the mortgaged debt, the mortgagee is liable to the mortgagor for the difference. The plaintiff, not having complied with the statute in regard to notice of the sale, must account for the full value of the property which came into his possession.

Having disposed of this branch of the case, the next question presented by the record is one of fact, relating to the value of the property. The testimony bearing upon that issue is conflicting. The first witness called by the defendants was Thomas Kane, the president of the company. He placed a value upon each chattel, and a careful computation of the same shows the aggregate valuation of the property as estimated by this witness to be over thirty-four thousand dollars. No other witness called by the defendant attempted to place a valuation upon the property as a whole, nor upon each item separately. Several of the defendant's witnesses testified as to the value of particular chattels, but an examination of their testimony shows that their estimates, almost invariably, are from one third to one half lower than the valuation placed upon the same property by the witness Kane.

The plaintiff called as witnesses Thomas H. Hicks, George Lang, Frank Ottoway, and James J. Kelly, who appear to have been familiar with the property in the fall of 1886, and acquainted with its value at that time. Each of these witnesses fixed a value upon the different chattels. The aggregate valuation of the entire property, as appears from the testimony of these witnesses, ranges from \$11,250 to \$11,750, which differs but little from the amount the property brought at the chattel mortgage sale. There was realized at the sale in October, 1886, \$10,607.60, and there was property subsequently sold amounting to \$447.75. By giving the defendant company credit on the note for the highest valuation placed

on the chattels by any witness for the plaintiff, and computing interest on the note according to the terms thereof, it makes the balance due the plaintiff at the date of the rendition of the decree a little more than the amount found by the decree. The conflict in the testimony as to the value of the personalty was settled by the trial court in favor of the plaintiff, which we cannot set aside without overruling numerous precedents to the effect that the finding of the district court will not be disturbed unless clearly against the weight of the evidence.

Counsel for appellants finally insist that the decree must be reversed because the court below refused to grant their motion for a continuance of the cause. This objection cannot be considered by us, for the reason no exception was taken in the district court to the ruling on the motion.

The decree is affirmed. —

INTEREST — LAW OF PLACE. — When bonds and a mortgage to secure the payment thereof are made in New York between parties resident there, and no provision is made for their payment elsewhere, they are presumably to be paid in New York and interest computed according to the laws of that state, although the mortgage given to secure them was upon property in Rhode Island: *Kavanaugh v. Day*, 10 R. I. 393; 14 Am. Rep. 691. A promissory note executed in another state, not made payable at any particular place, is payable in the state where executed, and draws interest according to the laws of that state: *Clark v. Seavright*, 135 Pa. St. 173; 20 Am. St. Rep. 868, and note; extended note to *Morris v. Hockaday*, 55 Am. Rep. 609. Compare *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332, and note.

INTEREST — CONFLICT OF LAWS. — A citizen of one state contracting a debt with a citizen of another state may agree to pay interest according to the laws of either state, but usury laws cannot be evaded under cover of naming a state whose laws shall control the contract: *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332, and note.

CHATTEL MORTGAGE — BREACH OF CONDITION. — A breach of any of the conditions of a chattel mortgage entitles the mortgagee to take possession and foreclose: *Lyon v. Ballentine*, 63 Mich. 97; 6 Am. St. Rep. 284, and note.

CHATTEL MORTGAGE — EFFECT OF IRREGULAR SALE ON FORECLOSURE. — Where a mortgagee of a chattel mortgage at the foreclosure sale acted as auctioneer, and himself purchased the property, such a proceeding was irregular, and he should be held to account for the value of the property, and if that was more than the amount due him, there should be a judgment against him for the residue: *Spencer v. Moran*, 80 Iowa, 374. See also *Pittcock v. Jordan*, 19 Or. 7.

DEERING v. RUFFNER.

[32 NEBRASKA, 845.]

EXEMPTIONS — CONTRACTS TO WAIVE. — A contract by which a creditor employs his insolvent debtor, who is the head of a family, at a monthly compensation, one half thereof to be paid in cash and the other half to be credited upon such indebtedness, cannot be enforced by the creditor after two months' services, when the statute exempts such compensation from garnishment or execution. Such debtor is entitled to the whole compensation contracted for, and may recover the half thereof which has been credited to his indebtedness by his creditor under the contract.

A. N. Sullivan, for the appellant.

Matthew Gering, for the respondent.

COBB, C. J. Peter E. Ruffner sued William Deering & Co. in the district court of Cass County. In his petition he alleged that on the twentieth day of May, 1888, he commenced work for the defendant company, at their special instance and request, as traveling salesman, and continued in its employment until the twenty-eighth day of July, 1888; that defendant promised to pay him the sum of two hundred dollars besides his expenses; that no part of said sum has been paid, except his expenses and the sum of one hundred dollars; and that there is due from said defendant company to the plaintiff the sum of one hundred dollars, and interest thereon from the twenty-eighth day of May, 1888.

The defendant answered that the plaintiff commenced working for the defendant at the time specified in the complaint, and continued in the employment of the defendant for the term of two months, for which plaintiff was to receive the sum of one hundred dollars per month, and fifty dollars for expenses; that plaintiff's expenses had been fully paid; that the plaintiff, by the terms of said contract of employment, was to receive credit on a certain indebtedness of his to defendant, then existing in favor of the defendant and against the plaintiff; that at said time plaintiff was indebted to defendant in the sum of not less than seven hundred dollars for moneys collected by plaintiff, no part of which has been paid by plaintiff except by said employment; that defendant's claim aforesaid was at all times such claim as could be enforced by suit; that defendant has given plaintiff full credit for said services on said indebtedness; that on the sixth day of July, 1888, defendant recovered a judgment against plaintiff in the county court of Cass County for the sum of \$292.35 and costs, no part

of which has been paid; that said plaintiff is wholly insolvent, and defendant is without means to collect any part of such judgment, except by applying defendant's claim to said indebtedness and giving him credit therefor, and that plaintiff's claim has been fully adjudicated in another suit between the parties in the county court of Douglas County.

There was a trial to the court, a jury being waived, with a finding and judgment for the plaintiff in the sum of one hundred dollars, with interest. The case comes to this court by petition in error, three errors being assigned, as follows:—

1. That said findings and judgment are contrary to law and the evidence in the case.

2. That said findings and judgment are not supported by sufficient evidence.

3. Said findings and judgment should be for defendant.

Upon the trial, Peter E. Ruffner, the plaintiff, was sworn as a witness in his own behalf. Testified that he is acquainted with Dion Geraldine; that in 1887 he was the traveling agent for William Deering & Co. in Nebraska; that plaintiff entered into a contract with him as agent for the said company in May, 1888; that after having some correspondence with him, plaintiff telephoned him, and he answered, to come to Omaha, which plaintiff did, and met him in his office by agreement; that they talked about the work, and said agent made plaintiff an offer, which plaintiff declined; that the said agent finally said: "Ruffner, I will do this with you: you may go to work for us, and I will give you one hundred dollars a month and your expenses, and fifty dollars I will pay you in cash, and fifty dollars will be allowed you a month on your account to William Deering & Co.," and that was the arrangement made between the two. Plaintiff further stated that at that time he was indebted to William Deering & Co.; that he worked under the terms of the contract, as above stated, for two months and two days; that he then received a telegraphic dispatch from Mr. Geraldine, at Springfield, Sarpy County, telling witness to come home and send in his account; that witness then returned home and sent in his expense-account and his bill for two months' services, and asked him to remit \$100, and that there was \$4.15 due witness, that he had paid more on the expense-account than he had received, to which he received no reply; this, witness states, was on the first or second day of the month of August. After telegraphing and writing several times, and threatening to draw on him at sight, on the

fourteenth day of the month witness received a letter from Mr. Geraldine; that on the 15th of August, Geraldine sent to witness a draft for \$4.15, and a blank receipt for \$200 for him to sign; that the next morning he went to Omaha, and finally had an interview with Mr. Geraldine; that witness pulled out the letter that he had received from him, and asked him how that was, that it was not according to "our agreement," and that the agent, Mr. Geraldine, replied that he knew that it was not according to the agreement, but said: "You put your property out of your name to defraud us, and I don't propose to give you a — cent"; that witness denied ever having put his property out of his name to defraud Deering & Co., etc. Witness further testified that he is the head of a family, and that the one hundred dollars for which he sues is for work and labor performed, — that is, for two months.

The defendant offered in evidence the deposition of Dion Geraldine, who deposed that he has resided in Omaha since September, 1886, and is acquainted with the plaintiff in this case; has known him since the fall of 1886; that, as the manager for William Deering & Co., deponent's duties are to have charge of all their business in the state of Nebraska in a general way, except collections, correspondence with legal collectors and banks; has charge of the appointment of agents; that Deering & Co. are manufacturers of grain and grass-cutting machinery; that the plaintiff has acted as the defendant's agent in and about the sale of these machines; that the plaintiff's agency for the sale of the defendant's machines terminated with the season of 1886; that at that time, and when deponent took charge of defendant's business, in November, 1886, according to the best of his recollection, there was a deficit of about \$900 in the account of the plaintiff as agent for the defendant; that this amount was afterwards reduced about \$250, which sum of \$250 was made in farmers' notes turned over to the traveling agent of the defendant by the plaintiff; that there was no dispute between plaintiff and defendant about the amount of this deficiency in the plaintiff's account with the defendant; that in addition to this \$250, that plaintiff has received a credit of \$200 on his account with the defendant for personal services rendered the company during the selling season of the present year; that the agreement between the plaintiff and defendant was to the effect that the plaintiff should devote his time and attention to the sale of machines, and other work which the company might have for him to do,

particularly in the vicinity of his home, for which he was to receive a credit, on account, of one hundred dollars per month, and fifty dollars per month to cover expenses; that deponent acted for the defendant in making that agreement with the plaintiff; that the agreement was made in the deponent's office at Omaha, deponent giving the particulars of the contract, that it is not deemed necessary to reproduce here. Witness further stated that the plaintiff went to work for the defendant on the terms offered by deponent as defendant's agent, and continued in such employment about two months; that defendant paid plaintiff for his expenses, at intervals, in checks, deponent thinks twenty-five dollars each; when the selling season was over, to the best of deponent's recollection, the whole amount of money sent him was \$105 for expenses, and credited him with the sum of \$200 to apply upon his own account. In the record I also find the following stipulation, signed by counsel for the respective parties: —

“In the District Court of Cass County, Nebraska.

“Peter E. Ruffner

v.

William Deering & Co.

} Stipulation.

“It is hereby stipulated by and between the parties to this suit admitted facts material to the issues in this case as follows: —

“1. That plaintiff agreed to work for defendant, as agent in selling defendant's machines, at the stipulated sum of one hundred dollars per month, and that defendant accepted his services at said sum per month.

“2. That defendant has paid the plaintiff's expenses while in its employ.

“3. That plaintiff was in the employ of defendant for the term of two months from the — day of —, 1888, until the — day of July, 1888; that prior to the time of said agreement, plaintiff was indebted to defendant in an amount greater than the wages earned by said plaintiff from defendant, and that said sum was then and ever since due and payable from plaintiff to defendant, and that during all of said time an action could be maintained by defendant against plaintiff for the recovery of the amount so as aforesaid due and payable from plaintiff to defendant.

“4. That on the tenth day of December, 1888, defendant recovered a judgment against plaintiff in the county court of Douglas County, Nebraska, for the sum of \$472.55.

" 5. That in said suit in said county court of Douglas County, defendant gave plaintiff credit for the sum of two hundred dollars, the wages earned by plaintiff, and which wages is the plaintiff's cause of action in this case.

" 6. That the plaintiff is insolvent.

" 7. It is further stipulated that on the sixth day of July, 1887, this defendant recovered against plaintiff a judgment for the sum of \$292.25 and costs, which judgment remains in full force and wholly unpaid.

"MATTHEW GERING,

"Attorney for Plaintiff.

"A. N. SULLIVAN,

"Attorney for Defendant."

It is probable that the finding and judgment in favor of the plaintiff depend altogether upon the efficiency of the statute, and the principle underlying it, which exempts from execution or garnishment the wages of laborers, mechanics, and clerks who are the heads of families, etc., not exceeding sixty dollars, or two months' wages, but I think that the principle underlying that statute is sufficient to sustain the judgment. It is true that the beneficiaries of this statute are designated as laborers, mechanics, and clerks, but I do not think that those terms are terms of limitation merely, but that by the use of them the legislature intended to designate all such persons as earn their living by wages, and whose compensation is measured by the day, week, month, or year; of course not including the employees of the government, state, county, or city. As to what the contract was under which the plaintiff was employed by the defendant, the evidence being conflicting, the verdict of the jury is conclusive. The judgment of the district court is therefore affirmed.

ATTACHMENT — EXEMPTION — WAIVER. — An agreement by a laborer to waive the proviso of the statute exempting wages from attachment, embodied in a note signed by him, is void: *Firmstone v. Mack*, 49 Pa. St. 387; 88 Am. Dec. 507, and note. The constitutional exemption of wages from garnishment may not be waived as to all future wages: *Green v. Watson*, 75 Ga. 471; 58 Am. Rep. 479, and note. An executory agreement to waive all benefit under the exemption laws is against public policy and void: *Moxley v. Ragan*, 10 Bush, 156; 19 Am. Rep. 61; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66, and note. See extended note to *Bowman v. Smiley*, 72 Am. Dec. 741, for a full discussion of this subject.

HENRY v. VLIET.

[88 NEBRASKA, 180.]

CHATTEL MORTGAGE — CONSIDERATION — A PRE-EXISTING DEBT, already due, is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage.

CHATTEL MORTGAGE — CONSIDERATION. — RELEASE OF A SURETY on a note already due, in consideration of a chattel mortgage executed by the maker of the note, is a valuable consideration for the mortgage.

Cornish and Robertson, for the plaintiff in error.

Hall and McCulloch, for the defendants in error.

COBB, C. J. The defendants in error brought their action for the possession of 60 barrels of gasoline, 750 cases of 100° flash-oil, and 300 cases two fifths 150° water-white oil, laying damages at \$500.

The defendant below made a general denial.

There was a trial to a jury October 29, 1887, with findings that the plaintiffs were entitled to possession; that the defendant was indebted to the plaintiffs \$757.52½ for the goods—with damages for detention of five cents. Motion for new trial was overruled and judgment entered on the verdict.

The plaintiff in error claims that on July 21, 1886, L. A. Stewart & Co., of Omaha, executed a chattel mortgage upon their stock of oils and gasoline, including the property in this action, to secure their commercial obligations.

OBLIGATIONS.	DATED.	DUR.	AMOUNT.
First note....	April 30, 1887.....	Ninety days.	\$5,000 00
Second note..	June 10, 1887.	Ninety days.	5,000 00
Third note...	June 22, 1887.....	Ninety days.	2,500 00
Fourth note..	June 25, 1887.....	Ninety days.	2,500 00
First draft....	July 19, 1887, on W. R. Stewart, Jr.		850 00
Second draft..	July 20, 1887, on W. R. Stewart, Jr.		2,617 50
Third draft...	July 21, 1887, on W. R. Stewart, Jr.		1,490 00
Amounting to.....			\$19,957 50

It is claimed that the notes, except that dated June 25, 1887, were renewals of prior indebtedness, the amount of ten thousand dollars of which was first loaned January 2, 1886; that the drafts were deposited, as cash, in the Bank of Omaha (owned by plaintiff in error), and that A. L. Stewart & Co. were allowed to draw against them as cash deposited, and all of which were protested for non-acceptance at Des Moines,

Iowa; that at the date of the mortgage there was in the Bank of Omaha to the credit of L. A. Stewart & Co., \$274.50; that the notes were signed by L. A. Stewart & Co., and by W. R. Stewart, Jr.; that on July 20, 1887, W. R. Stewart, Jr., of Des Moines, came to Omaha and insisted that L. A. Stewart & Co. should secure their indebtedness to the bank, upon which he was liable as surety. The mortgage was thereupon given, and in consideration of the entire indebtedness being secured, W. R. Stewart, Jr., was released.

It is claimed by the adverse party that the goods in controversy were sold to L. A. Stewart & Co. on condition that they were to be paid for in cash on delivery, or a secured note, or draft accepted by some bank, which conditions were not complied with; that the goods arrived at the Omaha freight depot on July 19, 1887, were taken out the same day into the warehouse of L. A. Stewart & Co., leaving \$830 charges for freight unpaid; that on the next day W. R. Stewart, the surety, appeared and was released, the mortgage was executed on the property thus secured in possession, and on the next day L. A. Stewart & Co. were bankrupts and insolvent.

It is further claimed that in October, 1886, this firm represented, for the purpose of obtaining the goods on credit, that it was worth twenty-five thousand dollars above liabilities, and was prosperous, which representations were false, and made for fraudulent purposes; that the cashier of the Bank of Omaha, on October 22, 1886, wrote to the defendants in error that "he considered Mr. Stewart reliable, and thought he had twenty-five thousand dollars in his business."

It is not in evidence that the plaintiff in error was either a party to these representations, or that he had notice of the conditions of sale to the failing purchasers. The letter of the cashier was dated nine months prior to the purchase and delivery of the mortgaged property, and if not too remote from the final transaction to have influenced it, there is no sufficient evidence to impeach the truth of the letter, or the responsibility of the purchaser at that date.

The first question of error presented is, to what extent a pre-existing debt becomes a valuable consideration within the rule of law which gives protection to a *bona fide* purchaser for value. On the trial, the court, of its own motion, instructed the jury,—“4. That if the defendant took a chattel mortgage upon the goods as security for an antecedent debt, and parted with nothing on the faith of his mortgage or purchase, he would

not be, as against the plaintiffs, a *bona fide* purchaser for value"; to which the defendant excepted, and requested the court to instruct the jury that "a pre-existing debt is a valuable consideration for a mortgage, and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time the mortgage was given."

This question was fully considered in the case of *Turner v. Killian*, 12 Neb. 580, wherein attaching creditors sought to impeach the validity of a chattel mortgage given to secure a previous debt. The court held: "As to attachment creditors of a mortgagor, a pre-existing debt, already due, is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage." The court also held that the question of fraudulent intent in the giving of a chattel mortgage was, in all cases, one of fact, and must be raised by suitable pleadings: Comp. Stats. 1891, sec. 20, p. 491. The voluminous testimony does not tend to raise the presumption that the plaintiff in error was a party to a fraudulent mortgage, or to the insolvency of the mortgagor.

In the case of *Manning v. Cunningham*, 21 Neb. 291, it was held that "a chattel mortgage executed by a mortgagor in possession as owner, although legal title was not to pass to him until the goods were paid for, where such contract of conditional sale was not filed for record, will take precedence over the secret lien of the party claiming to be the real owner of the property."

It does not appear from the evidence that any advantage whatever against the vendor and shipper of the property was taken by the other party to this suit. If the condition of sale was made as alleged, the defendants in error had ample and customary means of protection in requiring the fulfillment of that condition on delivery of the goods.

The mortgage to the plaintiff in error was therefore a valid instrument, paramount to the vendor's unfortified lien, if the consideration was sufficient.

It is not claimed that the notes and drafts of the mortgagor were supposititious, and it is not denied that the plaintiff in error was a *bona fide* creditor on that account. At the September term of the supreme court of Illinois in 1872, in the case of *Kranert v. Simon*, 65 Ill. 344, it was held, by Judge Breese and a full bench, that "where a *bona fide* creditor of one who purchased goods and had possession by means of

fraudulent representations took a mortgage without notice as to the fraud, that he was to be regarded as an innocent purchaser, and could not be deprived of his rights under his mortgage by a subsequent knowledge of the fraud of his debtor. And the debtor having sold and delivered the goods so purchased to his creditor, in payment of a pre-existing debt, who accepts them in good faith without notice of the fraud, the creditor will be protected as an innocent purchaser against any claim of the original owner, to the same extent he would be had he paid a new consideration for the goods."

If this decision, in an action of replevin, has hitherto been maintained, it infolds the present controversy and would seem to be decisive of it. The questions are the same, and the parallel is complete, only lacking the element of fraud. And we also find that a considerable number of the states which have considered the question in their higher courts have decided in harmony with the doctrine of *Turner v. Killian*, 12 Neb. 580; *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401; *Paine v. Benton*, 32 Wis. 491; *Shufeldt v. Pease*, 16 Wis. 659; *Frey v. Clifford*, 44 Cal. 335; *Gassen v. Hendrick*, 74 Cal. 444; *Knox v. McFarran*, 4 Col. 586; *Herman on Chattel Mortgages*, sec. 52; *Jones on Chattel Mortgages*, sec. 81; *McMurtrie v. Riddell*, 9 Col. 497; *Clark v. Barnes*, 72 Iowa, 563; *Goodman v. Simonds*, 20 How. 343; *Bank of Republic v. Carrington*, 5 R. L. 515; 73 Am. Dec. 83; *Fair v. Howard*, 6 Nev. 304; *Gibson v. Moore*, 7 B. Mon. 95; *Hayner v. Eberhardt*, 37 Kan. 308; *Laubenheimer v. McDermott*, 5 Mont. 512.

We have no hesitation in agreeing to the rule that a pre-existing debt does constitute a valuable consideration applicable to commercial obligations. Assuming that the plaintiff in error is unaffected with the equities between the defendant in error and the mortgagor of the goods in controversy, without notice and without evidence of the vendors' lien, we are of the opinion that the chattel mortgage, under these circumstances, was a lawful security to the plaintiff in error for the notes and drafts to become due. It would appear to be for the benefit of trade to give as extended a credit as practicable to the circulation of negotiable paper, that it may pass, not only for new purchases upon transfer, but also as security for pre-existing debts, as in the present instance. The creditor is thus enabled to secure his debt, to extend the credit of the debtor, or forbear legal proceedings to enforce its collection.

The debtor has the advantage of using his negotiable securities as the equivalent of money. We can see no substantial reason, therefore, why an adverse rule should apply to commercial paper, as security, to that of chattel property.

It may be said that a part of the consideration of the mortgagor was the release of a surety on the notes, that the goods from the owner in possession were not acquired by the plaintiff in error without an equivalent at the time of the transaction, constituting a single feature of the antecedent debt. This view was not rejected by the trial court, but the seventh instruction stated that "if the jury shall find that if the defendant released W. R. Stewart, Jr., from the promissory notes which the chattel mortgage upon the goods in question and others was given to secure, with the understanding that the mortgagor should be held, and that the mortgage was given in consideration of the release, then the defendant did, at the time, part with a valuable consideration in such release for the mortgage, and was an innocent purchaser for value of the goods, unless it be found that the defendant had knowledge of the fraudulent intent of the mortgagor at the time of the purchase of the goods."

It is not clear from the evidence of record that the plaintiff in error had knowledge of any fraudulent intent of the mortgagor in the purchase of the goods. The suspicious circumstances presented are not proof of fraud, and are not inconsistent with an honest intent and purpose on the part of the plaintiff in error in all the transactions detailed in evidence.

"Fraud is never to be presumed, but must be clearly proved, in order to entitle a party to relief on the ground that it has been practiced upon him": *Clark v. Tennant*, 5 Neb. 549.

"Fraud will not be imputed where the circumstances and facts upon which it is based may consist with honesty of purpose": *Clemens v. Brillhart*, 17 Neb. 335.

Other errors of trial are presented and argued by counsel, not deemed necessary to follow here in order to reach conclusions.

The fourth instruction of the court to the jury is held to have been erroneous, misleading, and prejudicial, for which the judgment must be reversed, independent of other errors assigned. The cause will be remanded to the district court to be proceeded with in accordance with law.

CHATTEL MORTGAGE TO SECURE PRE-EXISTING DEBT — VALIDITY OF. — A chattel mortgage to secure an existing debt, and to cover future advances, is valid: *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472; *Warren v. Creditors*, 3 Wash. 48; *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102, and note. A creditor who takes a mortgage in consideration of the extension of time of payment of a pre-existing debt is a purchaser for a valuable consideration: *Gilchrist v. Gough*, 63 Ind. 576; 30 Am. Rep. 250, and note. A precedent liability is a sufficient consideration for a mortgage: *Moore v. Fuller*, 6 Or. 272; 25 Am. Rep. 524, and note; see *Harrington v. Samples*, 36 Minn. 200.

THOMAS v. THOMAS.

[83 NEBRASKA, 572.]

RES JUDICATA — PLEADING. — The party relying upon a former adjudication as a defense must aver the particular court in which the judgment was rendered, and that the recovery was upon the same subject-matter and substantially between the same parties as the suit in which the defense of *res judicata* is made, and that the judgment is in full force; but a failure to aver the date when such judgment was rendered will not vitiate an answer.

JUDGMENTS — PLEADING FRAUD. — To AVOID A JUDGMENT on the ground that it was obtained by fraud, the facts constituting the fraud must be pleaded and proved.

Bradley and Delamatre, for the plaintiff in error.

Cowin and McHugh, for the defendants in error.

NORVAL, J. From a judgment rendered in favor of the defendants in the court below, the plaintiff prosecuted an appeal to this court. At the January term, 1890, the cause was submitted upon two motions, — one to quash the bill of exceptions and the other to dismiss the appeal. Both motions were sustained; the former because the bill of exceptions was not prepared, served, nor allowed within the time required by law, and the latter on the ground that the appeal was not taken within six months from the rendition of the judgment appealed from. Although the appeal was dismissed, the transcript was retained, and the plaintiff was permitted to file a petition in error. Subsequently, the cause was again submitted for decision upon the errors assigned in the petition in error.

This suit was instituted in the district court by John D. Thomas against Sylvia E. Thomas, Carrie L. Behm, and John F. Behm, the purpose and object of which was the cancellation of a deed of certain real estate situated in Douglas County, made by the plaintiff to said John F. Behm, which, it is al-

leged, was procured by certain false and fraudulent representations of the defendants. The fraudulent representations are set out in the petition with great particularity, but their repetition here is not necessary to a proper understanding of the question presented.

The defendants answered, denying each and every allegation of the petition, and as a further defense, answered as follows: "And said defendants, further answering said petition, say that the issue here joined has been heretofore tried in said court between said parties, and has been finally adjudicated in favor of said defendants; and said defendants further say that the judgment rendered in favor of said defendants still stands in full force, and is *res adjudicata*; and said defendants therefore plead the same in bar of this action."

No reply was filed. Upon the trial the court found that the defense of *res adjudicata* was sustained by the evidence, and dismissed the action.

It is urged by counsel for plaintiff in error that the plea of former adjudication is insufficient to support the judgment. It is safe to state that the general rule deducible from the decisions is, a judgment of a court having jurisdiction of the parties and the subject-matter is a complete bar, as to the question therein litigated, to a subsequent suit between the same parties or their privies. The party relying upon a former adjudication as a defense must aver, in his answer, in what court the judgment was rendered, and plead affirmative facts, showing that the recovery was upon the same subject-matter and substantially between the same parties as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force. Tested by this rule, the answer in the case at bar states a complete defense. It shows that both suits were brought in the same court, were between the same parties, involved the same issue, that judgment was rendered in the former action in favor of the answering defendants, and that said adjudication was in full force.

Fault is found with the answer because it fails to allege when the former adjudication was had. While in the approved forms of the plea of *res adjudicata* found in the various works on pleading the date when the judgment was rendered is given, yet we have been unable to find a single authority, and none has been cited by counsel, which holds that the plea is bad in substance if the date of the judgment is not pleaded. Had the precise date been averred, the allegation would have been

more specific, and had a motion been made to require the defendants to make their answer more definite and certain in that respect, it would have been well taken; but the objection cannot be raised for the first time after trial and judgment. The objection to the sufficiency of the answer is overruled.

Considerable is said in the brief of plaintiff about the former judgment being obtained by fraud, and numerous authorities are cited to sustain the proposition that where fraud has been practiced by the successful party in obtaining an adjudication, the judgment is void, and constitutes no bar to another action. A sufficient answer to this part of the brief is, that no such question is presented by the record. The facts constituting the fraud should have been set up in a reply to the answer. As no reply was filed, the allegations of the answer must be taken as true. The judgment is affirmed.

JUDGMENTS — RES JUDICATA — NECESSITY FOR PLEADING. — If a party relying upon a judgment fails to plead it in actions wherein judgments are required to be pleaded, the estoppel is waived: *Kilheffer v. Herr*, 17 Serg. & R. 319; 17 Am. Dec. 658, and note.

FRAUD — NECESSITY FOR PLEADING. — In an action for fraud, the plaintiff must allege the facts constituting the fraud: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162. In a covenant for the breach of a contract, accompanied with fraud, the fraud may be averred in the declaration and made the subject of inquiry in the action: *Cutler v. Cox*, 2 Blackf. 178; 18 Am. Dec. 152; note to *Huston v. Williams*, 25 Am. Dec. 95. In an action for fraud, the *scienter* must be alleged and proved: *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Conant v. National etc. Bank*, 121 Ind. 323.

HOAGLAND v. LUSK.

[88 NEBRASKA, 376.]

MECHANIC'S LIEN — PARTNERSHIP. — Where two of three partners, holding the legal title to a lot, contract in the name of the firm for materials used in the construction of a building thereon, a mechanic's lien attaches to the lot and the building.

MECHANIC'S LIEN IS NOT WAIVED by taking a note for the amount due thereunder, and giving the debtor a receipt in full, unless such was the intention of the parties.

MECHANIC'S LIEN IS NOT WAIVED by accepting the note and chattel mortgage of the debtor as collateral security for materials furnished and used by the mortgagee in the construction of the mortgagor's building, unless such is clearly shown to have been the intention of the parties.

Hastings and McGintie, for the appellants.

Dawes and Foss, and Palmer and Hendee, for the appellee.

NORVAL, J. This suit was brought in the court below by the appellee to foreclose a mechanic's lien. Cross-petitions were filed by E. I. Ferguson and the Combination Gas Machine Company. A decree of foreclosure was entered, which gave E. I. Ferguson a first lien for the sum of \$2,566.87, and the plaintiff a second lien for the sum of \$363.64. The cross-petition of the Combination Gas Machine Company was dismissed. The defendant Henry S. Ferguson appeals from so much of the decree as allowed to plaintiff a mechanic's lien.

The appellant insists that the plaintiff was not entitled to a mechanic's lien, because the materials were not furnished under any contract with the owner of the premises. The materials were sold by the plaintiffs to Lusk Brothers & Co. for the construction of a brick building upon lot 146, in the town of Friend. The firm consisted of Abner P. Lusk, William S. Lusk, and Joseph G. Boynton. At the time the materials were sold and delivered, the Lusks were the owners of the lot. The materials were furnished and the building erected with the knowledge and consent of the owners of the legal title of the lot. In fact, the undisputed evidence is, that the Lusks personally contracted for the material on behalf of the firm. This was sufficient to subject their interest in the property to the operation of the mechanic's lien.

Did the appellee, prior to the purchase of the premises by the appellants, release all right and claim to a lien? On October 30, 1887, the defendant E. I. Ferguson loaned to Abner P. and William S. Lusk \$2,250 on sixty days' time, and as security for the payment of the same took a mortgage on the lot. At that time the building was nearly completed, and plaintiff was entitled to file a lien in the sum of \$680.32, the same being the balance due for materials furnished, but had not yet done so. Ferguson refused to pay out the money on the loan with the plaintiff's right to a first lien still existing. After some negotiations, the plaintiff finally agreed that on the payment of \$250.32, and on Lusk Brothers & Co. giving their note for \$430, he would accept the same and release his right to claim a lien prior to the mortgage. The money was paid over out of the proceeds of the loan, and the note was executed and delivered on November 2d. The plaintiff gave a receipt in full of the account, and relinquished all right of lien

on the property. This receipt was delivered to Ferguson at the time he paid the money to B. F. Rengler, the manager of the plaintiff's business at Friend, who executed the receipt on behalf of the plaintiff. The receipt being either lost or misplaced, it could not be produced at the trial. While Rengler's testimony is to the effect that he did not give such a paper, the evidence to the contrary is overwhelming.

It is obvious that E. I. Ferguson having made the loan on the property on the faith of the plaintiff's agreement to waive or relinquish his right to a lien, the plaintiff could not afterwards be permitted to assert it to the prejudice of said mortgagee. The giving to Mr. Ferguson the first lien for the amount due on his mortgage clearly indicates that the trial court applied the doctrine of equitable estoppel. Manifestly this was right and proper. We are satisfied, from a careful perusal of the evidence, that it was not the intention of any of the parties that the plaintiff, by the giving of the receipt, relinquished all right to claim a lien, but that his lien, when acquired, should be postponed to Ferguson's mortgage. The plaintiff's account for materials furnished was not paid in full, a note being taken for a part thereof. Neither the accepting of the note, nor the giving of the receipt as in full payment for the demand, was an abandonment of his right to perfect a lien: *Van Court v. Bushnell*, 21 Ill. 624; *Brady v. Anderson*, 24 Ill. 110; *Goble v. Gale*, 7 Blackf. 218; 41 Am. Dec. 219; *Paddock v. Stout*, 121 Ill. 571; *Jones v. White*, 72 Tex. 316.

The doctrine of estoppel cannot be invoked in favor of the appellant Henry S. Ferguson, for the obvious reason that there is not a line of testimony to show that he was induced to take a deed of the property by reason of the giving of the receipt by the plaintiff, or that the grantee in the deed had any knowledge that such a receipt was ever given, nor was he in any manner led to believe from any act of the plaintiff that it was the intention upon the plaintiff's part to waive or relinquish his lien; while, on the other hand, the plaintiff's sworn statement of lien being upon record when the deed was made, the purchaser was chargeable with notice thereof, and the title thus acquired was subject to plaintiff's rights in the property.

In January the firm of Lusk Brothers & Co. failed. At that time the plaintiff took a note executed by William S. Lusk, secured by chattel mortgage on some potatoes, as collateral security of the plaintiff's claim. The potatoes were subse-

quently sold under the mortgage and the proceeds applied towards the payment of the plaintiff's demand. The note and chattel mortgage were not accepted by the plaintiff as payment, but simply as additional and collateral security, without any intention to waive the lien given by statute. The taking of the security did not affect the lien. Upon this proposition there is an irreconcilable conflict in the authorities. The rule which we have stated is, we think, sustained by the better reason: *Ford v. Wilson*, 85 Ga. 109; *Howe v. Kindred*, 42 Minn. 433; *Hinchman v. Lybrand*, 14 Serg. & R. 32; *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84. The judgment of the district court is affirmed.

MECHANIC'S LIEN — WAIVER. — A mechanic's lien is not waived by taking the notes of the debtor, nor by giving to the latter a receipt as in full for the demand: *Goble v. Gale*, 7 Blackf. 218; 41 Am. Dec. 219, and extended note. The taking of a note payable at a future time, but within the period limited for the duration of the lien, does not waive a mechanic's lien: *Steamboat Charlotte v. Hammond*, 9 Mo. 58; 43 Am. Dec. 536, and note; *Bailey v. Hull*, 11 Wis. 289; 78 Am. Dec. 706, and note. Where a promissory note of a third person, who afterwards becomes insolvent, is accepted in part payment for the construction of a building, such acceptance, although without the knowledge of the surety upon the contractor's bond, does not constitute such a change in the contract as to release the surety, the contractor, in the absence of a prohibition, having the right to waive payment in money: *Foster v. Gaston*, 123 Ind. 96.

MECHANIC'S LIEN. — As to the power of an agent of the owner of land to contract a mechanic's lien thereon, see extended note to *Loonie v. Hogan*, 61 Am. Dec. 695. In *Ness v. Wood*, 42 Minn. 427, where there were five executors of an estate, and four of them gave a mechanic's lien for certain improvements upon the estate, it was held that such lien could not be decreed against the interests of the fifth executor, who was also a devisee, and who refused to become a party to the contract.

SEEBROCK v. FEDAWA.

[33 NEBRASKA, 412.]

WILLS. — MISTAKE OF DESCRIPTION IN wills, either of the beneficiaries or of the subject-matter of the devise, will not avoid it, if enough remain to show with reasonable certainty what was intended. Thus a devise of lots 4, 9, and 10 in a certain block will pass lots 3, 9, and 10 in the same block, when the latter are all the lots owned by the testator in that block.

WILLS — CONTEST — COSTS. — When there is probable cause for contesting a will, and the estate is valuable, the costs and a reasonable attorney's fee for the contestant will be taxed against the estate.

Lamb, Ricketts, and Wilson, for the appellants.

Pound and Burr, Billingsley and Woodward, and N. C. Abbott, for the appellee.

MAXWELL, J. This case was before this court in 1889, the judgment of the court below being affirmed. A motion is now made by the contestants to modify the judgment so as to leave out lot 8 in block 32, in the city of Lincoln, as said lot is not devised in the will. There is also an application for fees and costs. The will in question is as follows:—

“LAST WILL AND TESTAMENT OF JOHN ADAM FEDAWA.

“I, John Adam Fedawa, of the city of Lincoln, Nebraska, being of sound, disposing mind and memory, do make, publish, and declare this my last will and testament.

“I give, bequeath, and devise unto my beloved wife, Margaret Ann Fedawa, all and every of my personal estate and property of every description and nature whatsoever, and wheresoever the same may be situated, except as hereinafter named. I also give, bequeath, and devise unto my wife, Margaret Ann Fedawa, all of lots numbered 4 and 9, the west one half of lot numbered 10, all in block numbered 32, in the city of Lincoln, Lancaster County, and state of Nebraska, according to the recorded plat thereof.

“To have and to hold all of the said above-described property to her exclusive use and benefit, so long as she shall remain my widow, or until my beloved son, Jay Gould Fedawa, shall come to the age of twenty-one years, then and upon either of these conditions the said above-described property shall be divided equally, share and share alike, among my four beloved children, Millie May Fedawa, Flora Belle Fedawa, Florence Dale Fedawa, and Jay Gould Fedawa.

“Provided further, that should it be found necessary to sell and dispose of any of said property, that lot numbered 4 of block numbered 32 of above-described property may be sold, and none other.

“I further give, bequeath, and devise unto my children by my first wife, J. A. M. Fedawa, Lorinda Fedawa, and Milton Fedawa, the sum of seventy-five dollars, cash money, to be paid to them upon my death, share and share alike.

“All the rest and residue and remainder of my estate, both real and personal, I hereby give, bequeath, and devise unto my said wife, Margaret Ann Fedawa, and as well the lots here-

inbefore described, to wit, lots numbered 4 and 9 in the west half of block numbered 32, in Lincoln, Nebraska, hers to have and to hold, to own and control, subject, however, to the conditions herein mentioned.

"And provided further, that my said wife shall not, by taking under this will, waive or relinquish her right of dower in said premises, upon the determination of her life estate herein created.

"I hereby appoint my said wife, Margaret Ann Fedawa, and Carlos C. Burr, joint executors of this my last will and testament, hereby revoking all former wills by me made, and I hereby authorize and empower my said executors, on the sale of said lot 4, to make, execute, and deliver any and all deeds necessary of conveyance, necessary and proper to pass title thereto to any purchaser, and that such deed as they may make shall be construed to pass the interest therein which by its terms such deed purports to convey, and they shall not be required in the premises to ask any aid from any court.

"In witness whereof, I have hereunto set my hand and seal this twenty-ninth day of December, 1886.

"JOHN ADAM FEDAWA.

"Signed in the presence of—

"A. F. PARSONS.

"F. C. HARRISON."

It is admitted that Fedawa did not own lot 4 in block 32, but he did own lot 3 in that block, and the contestees contend that parol evidence is admissible in connection with the statements in the will to show that he intended to devise lot 3. The language of the will is: "I also give, bequeath, and devise unto my wife, Margaret Ann Fedawa, all of lots 4 and 9, the west half of lot numbered 10, all in block 32." The evidence clearly shows that these were all the lots he possessed in block 32.

While it is true that oral evidence cannot be admitted to change the language of a written instrument, and particularly of a will, yet the universal rule at the present time is to admit oral proof to show that one term was used for another, or that an essential term, to make the definition perfect, was omitted or erroneously stated. For the purpose of arriving at the intention of the testator, therefore, the will is to be read in the light of the surrounding circumstances. Thus, suppose a party should devise the manor of B., and it should appear that the testator possessed two manors,—one known as East B.,

and the other as West B., — parol evidence is admissible to explain the ambiguity by showing the testator's intention: *Oxenden v. Chichester*, 4 Dow, 65; 3 Taunt. 147; *Doe ex dem. Thomas v. Beynon*, 4 Perry & D. 193; 12 Ad. & E. 431; *Fleming v. Fleming*, 1 Hurl. & C. 242; 8 Jur., N. S., 1042; 31 L. J. Ex. 419; 10 Week Rep. 778; 6 L. T., N. S., 896; *Doe ex dem. Morgan v. Morgan*, 3 Tyrw. 179; 1 Crompt. & M. 235; *Whitaker v. Tatham*, 7 Bing. 628; 5 Moore & P. 628; *Allen v. Allen*, 4 Perry & D. 220; 12 Ad. & E. 451; 4 Jur. 985.

The rule in construing wills is, that although there may be errors in the description, either in the legatee or the subject-matter of the devise, it will not avoid the bequest, if enough remain to show with reasonable certainty what was intended: *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144; *Jackson v. Sill*, 11 Johns. 201; 6 Am. Dec. 363; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; and parol evidence is admissible to correct the mistake: *Patch v. White*, 117 U. S. 210; *Decker v. Decker*, 121 Ill. 341; *Moreland v. Brady*, 8 Or. 303; 34 Am. Rep. 581; *Gilmer v. Stone*, 120 U. S. 586.

It is evident that the testator intended to devise all the lots he possessed in block 32 in the city of Lincoln, and that lot 3 was intended in place of lot 4.

We are asked to tax the costs of the contest to the estate, and also to allow a reasonable attorney's fee to the attorneys for the contestants. The contestants in this case were the children of the first wife of the testator. The estate is shown to be quite valuable, and they were practically disinherited. There is a large amount of testimony in the record tending to show that for some time prior to making the will the testator was not in a condition of mind to make a proper disposition of his property. There is other testimony tending to show that he was of sound and disposing mind at the time of making the will. This testimony was submitted to a jury and the will sustained. Thus the questions of fact were found by the jury, and the evidence being conflicting, this court could not say that it was clearly wrong, although, had the question been primarily submitted to this court, it is probable that a different conclusion would have been reached. There was probable cause, therefore, for contesting the will, and the costs will be taxed to the estate, and the attorneys for the contestants allowed the sum of one thousand dollars for all fees and expenditures, to be paid within ninety days.

Judgment accordingly.

WILLS — SUFFICIENCY OF DESCRIPTION IN. — The description of a bequest, if false in part, may be made sufficiently certain by reference to extrinsic circumstances: *McCall v. McCall*, 4 Rich. Eq. 447; 57 Am. Dec. 733, and note. A devise is not void for uncertainty of quantity of interest given, if a measure for determining the quantity is furnished by the will: *Macet v. Nason*, 21 Vt. 115; 52 Am. Dec. 41, and note. Where a testator devised lands to one person, lot 2 in block 187, and to another, lot 1 in the same block, and did not own such lots, parol evidence was admitted to show that he did own lots 3 and 4 in that block, and that those lots would pass by the will: *Moreland v. Brady*, 8 Or. 303; 34 Am. Rep. 581, and note; extended note to *Kurtz v. Hibner*, 8 Am. Rep. 669. Where a will devised "a small farm in Wayne County, Iowa, near the Missouri line," and there was nothing else in the will to aid in the identification of the land, it is not sufficient to pass the title to forty acres in Lucas County and ten acres in Wayne County, six miles away: *Christy v. Baulger*, 72 Iowa, 581.

WILLS — CONTEST COSTS, WHETHER CHARGEABLE ON ESTATE. — The costs of both parties may be charged upon the estate, where there was probable cause for contesting the validity of a will, as shown by the conduct of the testator: *Olapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681, and note; see *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489.

WATSON v. TROMBLE.

[33 NEBRASKA, 450.]

JUDICIAL SALES — EFFECT OF CONFIRMING. — An order confirming a sale of real estate, by a court having jurisdiction of the parties and subject-matter, cures all defects in the appraisement and sale, in the absence of fraud, and is conclusive upon the parties and their privies until reversed.

Byron Clark, for the plaintiff in error.

W. L. Browne and E. H. Wooley, for the defendant in error.

NORVAL, J. The plaintiff in error was plaintiff in the court below. A general demurrer was sustained to the petition, and the action dismissed. The petition contained two counts.

As a first cause of action it is alleged, in effect, that the plaintiff, on and prior to May 1, 1888, was the owner of the east half of the northwest quarter and the north half of the southwest quarter of section 35, township 10 north, of range 12, in Cass County; that on said date, in a suit pending in the district court of said county, wherein Deere, Wells, & Co. were plaintiffs, and the plaintiff herein and one John W. Clarke were defendants, a decree was entered foreclosing two mortgages on said real estate, one in favor of Deere, Wells, & Co. for \$126.50, and the other in favor of said John W. Clarke for \$263.70, the decree bearing interest at ten per

cent from its date; that an order of sale was subsequently issued, the real estate above described was appraised, advertised, and sold, which sale was duly reported to the court and by it confirmed; that William L. Browne was the purchaser at the sale, but that the defendant John Tromble has since purchased said land and is now the owner thereof; that the officer, in making the appraisement, deducted from the gross appraised value of the land all encumbrances thereon, including the amount of the above liens, for the satisfaction of which the sale was made; that by reason thereof the plaintiff is entitled to recover from the defendant the amount of said liens, with interest thereon; and that the same be decreed a lien upon said real estate.

In the second count it is alleged, in substance, that on the seventeenth day of March, 1887, but prior to the time plaintiff purchased said real estate, one Rebecca Watson had a dower interest therein, and on said date executed, acknowledged, and delivered her certain mortgage deed, whereby she conveyed to Thomas M. Howard and John W. Clarke, to secure the payment of her four promissory notes, aggregating five hundred dollars, which said mortgage was duly recorded on the nineteenth day of March, 1887, and the real estate therein described was sold under the decree of foreclosure mentioned in the first count of the petition; that the sheriff, in appraising said land for the purpose of sale under said decree, deducted, as a lien, the amount of the above-described mortgage, although long prior to such appraisement the plaintiff herein had purchased said real estate subject to said mortgage and had paid the same to said John W. Clarke and Thomas M. Howard, but the release had not at the time of said appraisement, nor has it yet, been placed upon record to show that said mortgage had been satisfied, so that when said appraisement was made, and from thence to the present time, said mortgage appears as a valid and subsisting lien upon said real estate; that the mortgage and the notes thereby secured have been assigned and delivered to the plaintiff herein.

The plaintiff prays that he be subrogated to the rights of Clarke and Howard in said mortgage, and for a decree of foreclosure and sale.

Plaintiff's causes of action are based upon certain alleged errors in the appraisement and sale of his real estate under a decree of foreclosure. In order to prevent the real estate of a debtor from being sacrificed at judicial sales, the legislature

has provided for the appraisement of the interest of the debtor therein, and that it shall not be sold at less than two thirds of its appraised value. In making the appraisement, it is the duty of the officer and the appraisers selected by him to deduct from the real value of the lands and tenements to be sold the amount of all liens and encumbrances existing thereon prior to the lien of the judgment. The interest of the debtor is the difference between the gross value of his property levied upon and the amount of such liens. For the purpose of ascertaining the amount of liens upon the land, it is made the duty of the county clerk, the clerk of the district court, and the county treasurer of the county where the land is situated, upon written application of the sheriff, to certify to him officially the amount and character of all liens existing against the real estate which are prior to the lien of the judgment to satisfy which the sale is to be had. It is clear that, under the provisions of our statute and the decisions of this court, the appraisers had no authority to treat as liens the amounts due on the mortgages mentioned in the plaintiff's first cause of action, and under which the sale was made: *Drew v. Kirkham*, 8 Neb. 481.

It appears from the allegations contained in the second count of the petition that in appraising the property there was deducted as a lien a five-hundred-dollar mortgage which had previously been paid, but had not been satisfied upon the record. It was an apparent lien, and while it was included in the certificate of the county clerk as an encumbrance upon the land, the certificate was not conclusive upon Watson. He could have resisted the confirmation of the sale, and shown that the mortgage debt had been paid, and no lien in fact existed. Had such steps been taken, or had he filed exceptions to the report of sale, on the ground the mortgages under which the sale was had were deducted as liens by the appraisers, it would have been the duty of the court to have set aside the appraisement and sale, in case it appeared that the debtor was prejudiced by the deduction as liens of the amounts of these mortgages. The petition contains no allegation as to the gross value of the real estate sold under the decree, what the interest of the debtor therein was appraised at, nor what amount it brought at the sale. For aught that appears in this record, the property sold for a sum equal to or more than two thirds of the gross appraisement. If so, Watson was not in

any way prejudiced by the action of the appraisers: *Drew v. Kirkham*, 8 Neb. 481.

The plaintiff, Watson, was a party to the foreclosure suit, and should have urged his objections to the appraisement before the confirmation of sale. No excuse is given for his not having done so, nor is there any charge of fraud or collusion. No fraud being alleged, it must be held that the order of confirmation cured all defects and errors in the appraisement and sale, and that the purchaser acquired all the title of the judgment debtor in the property: *Neligh v. Keene*, 16 Neb. 407; *Wilcox v. Raben*, 24 Neb. 368; 8 Am. St. Rep. 207. It follows that no cause of action is stated in either count of the petition, and the demurrer was rightly sustained. The judgment is affirmed.

JUDICIAL SALE — ORDER CONFIRMING. — Effect and Conclusiveness of. — An order or decree confirming a judicial sale is a final and conclusive judgment determining the rights of the parties, possessing the same force and effect as any other adjudication by a court of competent jurisdiction: *Allison v. Allison*, 88 Va. 328; *Kincaid v. Tutt*, 88 Ky. 392; *State National Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185; *Thomas v. Davidson*, 76 Va. 338; *Brown v. Gilmer*, 8 Md. 322; *Dawson v. Litsey*, 10 Bush, 408.

An order of confirmation being a final judgment, the court has no authority to set it aside at a term subsequent to that at which it was rendered: *State National Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185; *Kincaid v. Tutt*, 88 Ky. 392. And after confirmation by the court, the sale cannot be directly attacked, except for fraud, mistake, surprise, or the like, for which equity would give relief if the sale had been made by the parties in interest instead of by the court: *Berlin v. Melhorn*, 75 Va. 639; *Thomas v. Davidson*, 76 Va. 338; *Karn v. Rorer Iron Co.*, 86 Va. 754; *Brown v. Gilmer*, 8 Md. 322; *Allison v. Allison*, 88 Va. 328.

An order confirming a judicial sale is conclusive upon all matters upon which the court passed, or might have been called upon to pass, had the parties brought them forward as objections to the confirmation: *Willis v. Nicholson*, 24 La. Ann. 545; *Speck v. Pullman Palace Car Co.*, 121 Ill. 33; *Cockey v. Cole*, 28 Md. 276; 92 Am. Dec. 683. This is especially so when the parties had knowledge, or might reasonably have had knowledge, of the facts upon which to base objections to confirmation: *Speck v. Pullman Palace Car Co.*, 121 Ill. 33. This rule is thus well stated in *Thomas v. Davidson*, 76 Va. 338, 344: "After the confirmation, a complete contract has been made between the court and the purchaser, and the latter will not be heard to make objections founded upon the errors in the proceedings which might have been remedied by timely notice."

Confirmation Cures What Irregularities. — It is generally ruled that as the order of confirmation of a judicial sale has the effect of a final judgment, it also has the effect of curing all irregularities in the proceedings leading up to the sale: *O'Brien v. Gaslin*, 20 Neb. 347; *McRae v. Daviner*, 8 Or. 63; *Harrison v. Harrison*, 1 Md. Ch. 331; *Thorn v. Ingram*, 25 Ark. 53; *Core v. Strickler*, 24 W. Va. 689; *McGarock v. Bell*, 3 Cold. 512; *Wilcox v. Raben*, 24

Neb. 368; 8 Am. St. Rep. 207; *Osman v. Traphagen*, 23 Mich. 80; *Thomas v. Davidson*, 76 Va. 338. Hence it has been held that an order confirming a sheriff's sale is a conclusive determination of the regularity of the proceedings concerning such sale as to all persons, in any action, suit, or proceeding: *McRae v. Daviner*, 8 Or. 63; and that though a trustee may not have followed the special directions of the decree, a subsequent confirmation of the sale by the court renders it as valid and binding as though such directions had been pursued in all respects: *Harrison v. Harrison*, 1 Md. Ch. 331. When a sale made under a decree of court is confirmed without exception, the irregularity that it was made by an unauthorized commissioner is cured, and a bill of review will not lie to correct it: *Core v. Strickler*, 24 W. Va. 689. If the particular order for the sale, as indicated by the decree ordering it, is departed from by the commissioner making it, but is not excepted to before confirmation, the order of confirmation cures the defect, in the absence of fraud: *McGavock v. Bell*, 3 Cold. 512. An order of confirmation is conclusive as to the validity of the sale, although it does not fully describe the property sold, if the defective description is aided by a correct description contained in the officer's return, to which reference is made by the date of the sale: *Wilcox v. Raben*, 24 Neb. 368; 8 Am. St. Rep. 207.

In an early case in Kansas it was decided that "the order of confirmation is an adjudication merely that the proceedings of the officer, as they appear of record, are regular, and a direction to the sheriff to complete the sale. If the execution is irregular or unauthorized by law, the defendant has his remedy, by motion to set it aside; or if it is void, by controverting the title made under it; and if it is levied upon property not belonging to the judgment debtor, or by any reason not liable to such execution, such wrong not appearing in the proceedings of the officer, has its appropriate remedy independent of and in no way affected by the order of confirmation": *Köhler v. Ball*, 2 Kan. 160; 83 Am. Dec. 451; affirmed in *Briggs v. Tye*, 16 Kan. 285-291. In *Wills v. Chandler*, 2 Fed. Rep. 273-275, it was said that "the order of confirmation cures all irregularities in the mode of making the sale, but can add nothing to the authority of the officer to make it." In *Lamaster v. Keeler*, 123 U. S. 376, it was determined that the confirmation of an execution sale will not cure an infirmity growing out of the nullity of the judgment under which it was had. While it is undoubtedly true that confirmation cannot validate a void sale: *Bethel v. Bethel*, 6 Bush, 65; 99 Am. Dec. 665; still, the proposition that "the order of confirmation is an adjudication merely that the proceedings of the officer, as they appear of record, are regular, and a direction to the sheriff to complete the sale," is open to criticism, as not being broad enough. Freeman on Void Judicial Sales, section 44, says: "With respect to chancery and probate sales, we apprehend that their confirmation has an effect beyond that conceded in Kansas to the confirmation of execution sales. The object of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the license to sell. The court may, if it deems best, ratify various irregularities in the proceedings. If the officer changed the terms of the sale, the court may ratify his action, provided the terms as changed are such as the court had power to impose in the first instance"; citing *Jacob's Appeal*, 23 Pa. St. 477; *Emery v. Vroman*, 19 Wis. 689; 88 Am. Dec. 726; *Thorn v. Ingram*, 25 Ark. 58. As we have shown, the order of confirmation is conclusive of all matters which were either passed upon by the court at the time, or which it might have adjudicated, had they been brought to its attention by the parties.

"The irregularities which are cured by the entry of a decree or order of

confirmation relate chiefly, if not exclusively, to the proceedings of the court and its officers, or of the person conducting the sale. The sale may have been attended by wrongful acts or devices of the purchaser, or by the positive fraud either of himself or of others, of which he has notice actual or presumed. Questions involving these frauds are not ordinarily presented for consideration at the time the sale comes on for approval or disapproval; their existence is generally not discovered until a later date. When they are not suggested to the court by the return of sale, or by some other means, they remain open, notwithstanding the decree of confirmation": Freeman on Void Judicial Sales, sec. 44; citing *Halleck v. Guy*, 9 Cal. 197; 70 Am. Dec. 643; *Ewing v. Higby*, 7 Ohio, 198; 28 Am. Dec. 633.

Collateral Attack. — As the order of a court of competent jurisdiction confirming a judicial sale has the effect of a final and conclusive judgment until set aside or reversed, such order cannot be collaterally attacked for any irregularity in the proceedings under which the sale was made: *Osman v. Trapagen*, 23 Mich. 80; *Wilcox v. Raben*, 24 Neb. 368; 8 Am. St. Rep. 207; *Hotchkiss v. Cutting*, 14 Minn. 537; *Cockey v. Cole*, 28 Md. 276; 92 Am. Dec. 683; *Willis v. Nicholson*, 24 La. Ann. 545; *Phillips v. Dawley*, 1 Neb. 320; *May v. Marks*, 74 Ala. 249. After a judicial sale is confirmed, it cannot be collaterally attacked on the ground that the commissioner making it, who was the attorney of the complaining party, entered into a conspiracy to defraud the plaintiff of his right in the land sold: *McLead v. Applegate*, 127 Ind. 349; or that the commissioner who made the sale was not authorized to make it: *Core v. Trickler*, 24 W. Va. 689; or that he exceeded his authority, and sold more land than was authorized by the judgment: *Dawson v. Litsey*, 10 Bush, 408; or by a showing that there was a failure to appraise the property: *Neligh v. Keene*, 16 Neb. 407; or of defects in the notice of sale: *Wyant v. Tuthill*, 17 Neb. 495; or that no such notice was given: *May v. Marks*, 74 Ala. 249; or that the sale was confirmed at an adjourned term of court instead of at the regular term, and that the administrator making the sale failed to take security for the purchase-money: *Wilkerson v. Allen*, 67 Mo. 502. Where, in an action of ejectment, the defendant's title was based on a probate sale, and the return of the sale as offered and received in evidence was not verified as required by the statute, but the order of confirmation contained a recital "that the return of the sale was duly verified by affidavit," the court said: "This recital is conclusive in the present case, and a finding of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact was not a jurisdictional one, and the principle applicable to the inconclusiveness of statements or recitals in judgments conferring jurisdiction does not apply": *Dennis v. Winter*, 63 Cal. 16.

Confirmation Relates Back to Day of Sale. — After a judicial sale is confirmed, the confirmation relates back to the date of the sale, and the purchaser is entitled to everything he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale: *Cale v. Shaw*, 33 W. Va. 299; *Taylor v. Cooper*, 10 Leigh, 317; 34 Am. Dec. 737.

Confirmation Binds Purchaser. — The doctrine of *caveat emptor* applies, after confirmation without fraud, to all judicial sales of real estate, and the purchaser who pays his money with a full knowledge of all the facts, or does not seek any remedy until the sale is confirmed and the deed executed and delivered to him, has no remedy to recover the money because of any irregularity in the sale or the proceedings leading up to it: *Farmers' Bank v. Peter*, 13 Bush, 591; *Worthington v. McRoberts*, 9 Ala. 297; affirmed in *Burns*

v. *Hamilton*, 33 Ala. 210; 70 Am. Dec. 570; *Burron v. Mullin*, 21 Minn. 374; *Williams v. Glenn*, 87 Ky. 87; 12 Am. St. Rep. 461; *Hickson v. Rucker*, 77 Va. 135; *Bassett v. Lockard*, 60 Ill. 164. Thus a purchaser at an administrator's sale after confirmation cannot recover the purchase-money on the ground that the property did not belong to the intestate's estate: *Headrick v. Yount*, 22 Kan. 344; and after confirmation, no deduction will be made in the purchase price, nor will the purchaser be released from his obligation to pay, for the reason alone that liens existed upon the property at the time of the sale unknown to him: *Farmers' Bank v. Peter*, 13 Bush, 591. So where the property is sold to the highest bidder, who fails to comply with his bid, and another person is substituted in his place, reported to the court as a purchaser, and the sale is confirmed as to the latter, he cannot avoid the sale and be released from the payment of the purchase-money: *Ewing v. Highy*, 7 Ohio, 198; 28 Am. Dec. 633; *Halleck v. Guy*, 9 Cal. 182-197; 70 Am. Dec. 643. In the last-named case the court said: "The mere substitution of one person for another cannot affect the validity of the sale. The order directing the sale and the order confirming it give vitality to the purchase."

Confirmation does not Validate Void Sale.—The order of confirmation exercises its curative powers upon voidable judicial sales only, and it cannot validate a void sale: *Bethel v. Bethel*, 8 Bush, 65; 99 Am. Dec. 655. "The sale being void, there is no subject-matter upon which the order of confirmation can act. If the court has no jurisdiction to order the sale, it has none to confirm it. Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it": Freeman on Void Judicial Sales, sec. 44; citing *Montgomery v. Samory*, 99 U. S. 482; *Shriver v. Lynn*, 2 How. 43; *Hawkins v. Hawkins*, 28 Ind. 66; *Minnesota Company v. St. Paul Company*, 2 Wall. 609; *Pike v. Wassell*, 94 U. S. 711; *Townsend v. Tallant*, 33 Cal. 54; 91 Am. Dec. 617; *Gains v. New Orleans*, 6 Wall. 642.

When the sale is void because the court did not have jurisdiction to order it, or because it included property not described in the decree or order of sale, the order confirming it does not give it any vitality: *Kaehler v. Ball*, 2 Kan. 160; 83 Am. Dec. 451; *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617. A confirmation of an execution sale will not cure an infirmity arising from the nullity of the judgment under which it was made: *Lamaster v. Keeler*, 123 U. S. 376; and an order confirming a sale by a person acting as special judge, under an agreement of the parties, is void, and vests no title, as no judicial power was imparted by such agreement: *Trotter v. Neal*, 50 Ark. 340.

In some of the states, statutes exist which require that notice of a motion to confirm a judicial sale must be given to heirs, administrators, or interested parties. Where this is the case, it seems that a confirmation of the sale without giving the notice as prescribed is a nullity, or, at least, that it does not preclude a collateral attack upon the sale: *Hawkins v. Hawkins*, 28 Ind. 66; *Perkins v. Gridley*, 50 Cal. 97; *Speck v. Wohlien*, 22 Mo. 310; *Ligon v. Ligon*, 84 Ala. 555; *Dugger v. Tayloe*, 60 Ala. 504; *Anderson v. Bradley*, 66 Ala. 263; *Tayloe v. Dugger*, 66 Ala. 444.

The effect of an order confirming a sale may be drawn in question in proceedings to which the purchaser is a party when he seeks to escape the payment of his bid, or, after its payment, to recover the amount thereof, either on the ground of failure of title, or that the sale as confirmed does not represent the real transaction. By the practice of the courts of chancery, a petition might be filed, even after the confirmation of a sale, suggesting some

fraud, mistake, misapprehension, surprise, or other adequate ground for equitable relief, and the purchaser or other party in interest brought before the court by some appropriate notice, and the sale vacated if the facts alleged in the petition were established by sufficient evidence: Freeman on Executions, sec. 304 l. The effect of this proceeding was to obliterate the order of confirmation. The effect of the order as *res judicata* must manifestly continue, even in chancery, until it has been proceeded against and annulled in a proper manner, and we doubt whether any of the American courts will allow an order of confirmation to be assailed by petition or motion so long after its entry as appears to have been the practice in English courts of chancery. At all events, until the order is vacated it must be received as a conclusive determination of the issues involved in it, as against the purchaser as well as against other persons: *Smith v. Arnold*, 5 Mason, 420; *Anderson v. Foulke*, 2 Har. & G. 346, 359. As the return of sale must show the property sold and the terms of sale, including the name of the purchaser, the confirmation must necessarily affirm that a sale was made of the property described, and none other, and that it was sold upon the terms and to the person designated in such return or in the order of confirmation. Therefore, a purchaser cannot resist proceedings against him to collect the amount of his bid by showing that the title to the property was defective or altogether failed: *Farmers' Bank v. Peter*, 13 Bush, 591; *Threlkelds v. Campbell*, 2 Gratt. 198; 44 Am. Dec. 384; *Capehart's Ex'r v. Dowery*, 10 W. Va. 130; *Thomas v. Davidson*, 76 Va. 338; *Hickson v. Rucker*, 77 Va. 135; *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599; *King v. Gunnison*, 4 Pa. St. 171; *Bashore v. Whisler*, 3 Watts, 490; *Burns v. Hamilton*, 33 Ala. 210; 70 Am. Dec. 570; *Halleck v. Guy*, 9 Cal. 181; 70 Am. Dec. 643; *Fox v. Mensch*, 3 Watts & S. 444; *Barron v. Mullin*, 21 Minn. 376; or that he was mistaken as to the character and quality of the lands sold: *Mechanics' S. & B. L. A. v. O'Connor*, 29 Ohio St. 651; or that the sale to him included property in addition to that described in the order of confirmation: *Barron v. Mullin*, 21 Minn. 376. So after a sale has been confirmed and the property ordered resold, through a failure on the part of the purchaser to comply with the terms of his bid, he cannot, in an action against him to recover the deficiency resulting from such resale, show that at the time of the sale the administrator agreed to give him possession of the property, and falsely assured him that the claims of one Reay thereto were unfounded, and that after the sale he applied to the administrator who made it, who thereupon returned him the ten per cent paid on the bid and released him from such bid upon his making an assignment to one B., and that when the administrator gave the notice of the application for a resale, he stated to the purchaser that such notice was merely for the purpose of obtaining a resale and would not cast any liability upon him: *Brummagin v. Ambrose*, 48 Cal. 366.

MEYER v. CITY OF LINCOLN.

[33 NEBRASKA, 566.]

ADVERSE POSSESSION OF STREETS. — Actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city by an adjoining lot-owner, under a claim of right, for the period prescribed by the statute of limitations, vests the absolute title thereto in such occupant.

E. P. Holmes, for the appellants.

Billingsley and Woodward, and J. E. Philpott, for the appellees.

NORVAL, J. This action was brought by August Meyer to enjoin the defendants, the mayor, councilmen, and street commissioner of the city of Lincoln, from opening an alleged public road or street in said city, by cutting down and removing numerous fruit and shade trees owned by the plaintiff, which are claimed by the defendants to be within the limits of said highway or street and to obstruct the travel thereon. It also appears that Adam Bax, Emma A. Beach, and Margaret Roath each brought a similar action against the defendants herein, which, for convenience, by agreement of parties, were tried with this in the district court, it being stipulated that all the causes should abide the decision in the suit of Meyer against Graham and others.

The trial court found the issues in favor of the plaintiff, Meyer, and rendered a decree perpetually enjoining the defendants from entering upon plaintiff's premises, or from injuring or destroying the trees thereon, or anywise interfering with the plaintiff's possession and enjoyment of the same. The defendants appeal.

In 1865 the territorial legislature of Nebraska passed an act entitled "An act to locate a territorial road from Forest City, in Sarpy County, to the south line of Lancaster County." Charles H. Walker, John P. Loder, and Richard Wallingford were named in the law as commissioners to locate the road. By the act, the commissioners were required to view and locate the road and make return thereof to the county clerks of the several counties through which the road should pass, on or before the first day of August, 1865: Laws 1865, p. 144.

The commissioners commenced their work in Lancaster County on August 1, 1865, but did not complete the same and make return to the county clerk of the county until the fifth day of September of the same year. A portion of this terri-

torial road was located on the section line between sections 35 and 36, in town 10, range 6 east, and is now known as a portion of Fourteenth Street, in said city. At the date of the location of this road, the title to the northeast quarter of said section 35 was in the United States. Subsequently, on the fifteenth day of January, 1870, the east half of said northeast quarter of section 35 was laid out and platted by the owner as "Dawson's addition to South Lincoln." The plat represents a street on the east side of the tract thus platted, and also the east tier of blocks as being the same in size as all other blocks in the addition. The legend recites that all lots are 142 feet deep by 50 feet wide. The plaintiff, Meyer, is the owner of lot 12 in block 44 of said addition, which lot lies on the east side of the addition, and next to the highway or street in controversy. Counting the lot fifty feet in width, the east side thereof is from six to eight feet west of the section line between said sections 35 and 36. The plaintiff's improvements which were sought to be removed by the defendant Byers as street commissioner are on the strip which it is claimed was set apart for said street or road. The defendants contend that this street is one hundred feet wide, the same as the other streets in the addition. If such is the case, the eastern tier of lots are much less than half the width called for in the legend attached to the plat of the addition.

In argument, the plaintiff insists that the territorial road already referred to was never legally located, nor was it ever ordered opened as a public highway, and that the land in dispute is a part of plaintiff's lot, and not within the limits of any street of the city of Lincoln. As we view the case, it will not be necessary for us to consider or decide the questions thus presented, but for the purpose of the case will assume that the ground in controversy is within the limits of a legal public street of the city of Lincoln.

The plaintiff alleges in his petition, and there is ample testimony in the record tending to show, that for more than ten years immediately prior to the bringing of the action the plaintiff and his grantor have been in the open, actual, adverse, peaceable, and continued possession of said premises, and held the same under claim of title. The evidence shows that a house with a cellar under it, a well, barn, smoke-house, fruit and shade trees, and a fence, have been upon the lot since 1878 or the spring of 1879. The house is about twenty feet west of the section line, and within the strip claimed to

be a part of the road or street known as Fourteenth Street. The trees were east of the house. The plaintiff and his grantor have paid, from year to year, the taxes levied upon said lot since 1870. Upon the trial there was no attempt to show that the land in controversy had been used or traveled upon by the public as a street for more than ten years, but on the contrary, it is clear enough from the evidence that the traveled road was east of the section line. Most of the improvements were made by the plaintiff's grantor, Christian Bohlman, who lived upon the premises for seven or eight years prior to 1885, when he sold the lot to the plaintiff, who immediately took possession and has resided thereon ever since. The possession of the plaintiff and his grantor was not in any manner disputed by any one, nor did the city authorities make any claim to the land until about the twenty-fourth day of July, 1889, when the street commissioner commenced removing the fence and cutting down the trees, whereupon this action was instituted to restrain the city authorities from proceeding to open a street through the premises.

By numerous decisions of this court it has been held that adverse possession of real estate as owner for ten years gives a perfect title to the occupant: *Horbach v. Miller*, 4 Neb. 47; *Gatling v. Lane*, 17 Neb. 79; *Haywood v. Thomas*, 17 Neb. 240; *Tex v. Pflug*, 24 Neb. 669; *Levy v. Yerga*, 25 Neb. 764; 13 Am. St. Rep. 525; *Obernaltte v. Edgar*, 28 Neb. 70; *Crawford v. Galloway*, 29 Neb. 261; *Petersen v. Townsend*, 30 Neb. 376; *Alexander v. Wilcox*, 30 Neb. 795.

Appellants contend that no one can acquire title to a street by adverse occupation. In other words, that the doctrine of adverse possession does not apply to municipal corporations. In our investigation of the subject, we find the authorities conflicting. The decisions of the highest courts of some of the states, notably California, Pennsylvania, New York, New Jersey, Rhode Island, and Louisiana sustain the doctrine for which the appellants contend, while the courts of most of the other states have held that the doctrine of adverse possession applies to municipal corporations, the same as individuals. The weight of the adjudications is certainly that way: *City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718; *City of Cincinnati v. Evans*, 5 Ohio St. 594; *Armstrong v. Dalton*, 4 Dev. 568; *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232; *Dudley v. Trustees of Frankfort*, 12 B. Mon. 610; *City of Galveston v. Menard*, 23 Tex. 349; *County of St. Charles*

v. *Powell*, 22 Mo. 525; 66 Am. Dec. 637; *City of Peoria v. Johnston*, 56 Ill. 45; *City of Richmond v. Poe*, 24 Gratt. 149; *City of Pella v. Scholte*, 24 Iowa, 283; 95 Am. Dec. 729; *Fort Smith v. McKibbin*, 41 Ark. 45; 48 Am. Rep. 19; *Cornwall v. Louisville etc. R. R. Co.*, 87 Ky. 72; *Clements v. Anderson*, 46 Miss. 581; *City of Wheeling v. Campbell*, 12 W. Va. 36; *Webber v. Chapman*, 42 N. H. 326; 80 Am. Dec. 111; *Schock v. Falls City*, 31 Neb. 599.

Dudley v. Trustees of Frankfort, 12 B. Mon. 610, was an action to restrain the marshal from removing plaintiff's inclosure off of the street as an obstruction. The plaintiff claimed the right to a part of the street by adverse occupancy. The court, in the opinion, say: "If the private citizen at any time encroach with his buildings and inclosures upon the public streets, the municipal authorities should, in the exercise of proper vigilance and of their undoubted authority, interfere by the legal means provided in their charter to prevent such encroachment in due time, and thus preserve for the public use the squares, streets, and alleys of the town in their original dimensions; but if a private individual or citizen has been permitted to remain in the continual adverse, actual possession of public grounds, or of a public street, or of part of a street, as embraced within his inclosure, or covered by his dwelling or other buildings, for a period of twenty years or more, without interruption, such citizen will be vested thereby with the complete title to the ground actually occupied by him; and the title, thus perfected by time, will be just as available against a municipal corporation as it would be against an individual, whose elder title and right of entry may be barred by a continued adverse possession for twenty years of his land."

In *City of Wheeling v. Campbell*, 12 W. Va. 36, that court, after a complete and critical review of the conflicting authorities, in the opinion, say: "We see no reason why a municipal corporation should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse possession of others. We do see great reasons why no time should bar the sovereign power, because the officers of the sovereign, whether king or state, have such various and onerous duties to perform, that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved

intact, and not subject to be impaired or lost by the neglect of officers. But the same reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioners, whose special duty it is to see that the streets, squares, and alleys are kept in proper order, and free from obstructions or encroachments. And if, with all this machinery and power confined to so narrow a compass, and the interests of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys, or squares of the city, and hold, enjoy, and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period described in the statute of limitations, the city not only does, but we think, according to reason as well as authority, ought to, lose all right thereto."

Upon a careful consideration of the question, we are satisfied, upon principle as well as authority, that adverse possession by an abutting lot-owner of a portion of a street in a city for the statutory period of limitations will give a complete title thereto to the occupant. To have that effect, the possession must be actual, visible, exclusive, and uninterrupted for the full period of ten years, under a claim of right. Under the facts proven, the city is barred from now asserting any right or claim to the property held by the plaintiff for ten years. The judgment is affirmed.

ADVERSE POSSESSION OF STREETS AND HIGHWAYS — The non-user by the public for a period of ten years of a highway, and the actual, open, notorious, and adverse possession thereof by a party for the same length of time, will, in Iowa, estop the public from claiming any right therein against such party or those claiming under him: *Orr v. O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277; but the authorities upon this subject conflict: See extended note to same case. Adverse possession of a city alley for the statutory period gives title to the occupant, in Arkansas: *Fort Smith v. McKibbin*, 41 Ark. 45; 48 Am. Rep. 19, and extended note. In an action to enjoin a property owner from erecting a building which it was alleged would encroach upon a public street, it was shown that the land so occupied had never been a street, and that the owner had been in open, adverse possession thereof for twenty-five years, it was held that the owner had gained title to the ground so occupied for that time: *Big Rapids v. Comstock*, 65 Mich. 78. Adverse possession by one, for over twenty-one years, of a portion of a public highway will not bar the right of the public to the use of the entire width: *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599.

THOMPSON v. RICHARDSON DRUG COMPANY.

[23 NEBRASKA, 714.]

FRAUDULENT CONVEYANCES. — CHATTEL MORTGAGE executed by a debtor upon his entire personal property of a value greatly in excess of the debt secured is fraudulent and void as to his other creditors.

Maule and Sloan, for the plaintiff in error.

Montgomery and Montgomery, and Churchill, Jeffrey, and Rich, for the defendants in error.

NORVAL, J. This is an action in replevin brought by the defendant in error to recover possession of 197 pairs of spectacles and goggles, 190 purses, 24 pen-holders, 4 boxes of pens, 22 boxes of pencil leads, 13 albums, 4 toilet sets, 135 blank-books, 15 library-bound books, 1 glass show-case, and 23 slates. The Richardson Drug Company claims the property under a chattel mortgage executed by one Josiah W. Grant. At the commencement of the suit, Henry Thompson held the goods as constable, by virtue of the levy of an execution issued out of a justice court on a judgment in favor of David Wise & Co. against said Josiah W. Grant. There was a verdict in the court below for the plaintiff.

In June, 1888, one J. W. Grant was engaged in the drug business at Fairmont. So far as is known, his property consisted of his stock of goods and store fixtures, which were of the value of about three thousand dollars. At the time, Grant was largely indebted to his creditors. On June 20, 1888, he went to Omaha, and while there executed a chattel mortgage upon all of his stock in trade and fixtures, including the property in controversy, to the Richardson Drug Company, to secure the payment of \$941.46, the mortgagor retaining possession of the property mortgaged, and carrying on the business the same as he had previously done. On the 23d of June he gave mortgages upon said property to Redhead, Norton, Lathrop & Co. for \$231.20; Simeon Sawyer and John H. Welch, \$400; and Winfield S. Dresser, \$270. On the twenty-seventh day of the same month, the exclusive possession of the entire mortgaged property was given to the Richardson Drug Company, under a written agreement entered into between the mortgagor and the various mortgagees, by the terms of which the Richardson Drug Company was to sell the goods at retail for a period not less than sixty days, unless a customer should be found to purchase the same in bulk, and out of the net pro-

ceeds the mortgage of the Richardson Drug Company was to be first paid, and the remainder, if any, was to be applied in satisfaction of the other mortgages, in the order of their priority. Subsequently, a portion of the goods, being those involved in this suit, were taken under the execution above mentioned.

In *Morse v. Steinrod*, 29 Neb. 108, it was held that a chattel mortgage executed by a debtor upon his entire personal property, of a value greatly in excess of the debt secured, is fraudulent and void as to the other creditors of the mortgagor. The same rule was held and applied in *Brown v. Work*, 30 Neb. 800.

These decisions are decisive of the case at bar. Here blanket mortgages were taken upon all the debtor's chattels, and, so far as appears, he owned no other property. The goods were three times the value of the debt due the Richardson Drug Company, and one third greater than the aggregate amount of all the mortgages. The transaction was in violation of the rights of the unsecured creditors of the mortgagor, and must be held fraudulent as to them.

The judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

CHATTEL MORTGAGES — WHEN FRAUDULENT. — A chattel mortgage, knowingly given for a larger amount than is due, and not as security for future advances, is fraudulent in law as to the creditors of the mortgagor: *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102, and note. Where a large part of the debt which a chattel mortgage is given to secure is fictitious, and it prefers creditors, it is fraudulent: *Kea v. Epstein*, 87 Ga. 115. A chattel mortgage for the benefit of certain creditors which is an assignment of all his property is void as to unsecured creditors: *Atkinson v. Weidner*, 79 Mich. 575. See also *Diver v. McLaughlin*, 2 Wend. 596; 20 Am. Dec. 655.

OMAHA AND FLORENCE LAND AND TRUST COMPANY v. PARKER.

[33 NEBRASKA, 775.]

STATUTE OF LIMITATIONS — ABSENCE FROM STATE. — To prevent the running of the statute of limitations against a party because of his removal from the state, his absence must be such as will prevent the bringing of an action against him while absent.

ADVERSE POSSESSION BY AGENT OR TENANT. — Possession of land, to be adverse, must be made by means of actual entry and occupation thereof, but such possession may be made and continued either by the adverse claimant, or by his agent or tenant for him.

ADVERSE POSSESSION OF LAND MAY BE DISCLOSED by the appropriate use of the property by the claimant, or by his agent or tenant for him, according to its quality and condition, and may be by fencing and pasturing the land, or by cultivation and payment of taxes thereon, claiming to be the owner thereof.

ADVERSE POSSESSION BY AN ABSENTEE FROM THE STATE. — When adverse possession of land is begun by a person by actual entry, and continued by him through his agent or tenant, his absence from the state will not suspend the right to bring an action to recover the possession of the land, nor interrupt the running of the statute of limitations in his favor.

Congdon and Hunt, for the plaintiff in error.

Lake and Hamilton, for the defendant in error.

MAXWELL, C. J. This action was brought in the district court of Douglas County by the plaintiff against the defendant to recover the possession of "outlots" 226 and 227 in the city of Florence. The answer contained,—1. "A general denial"; 2. "A plea of title in the defendant, and the statute of limitations." To this answer a reply was filed, setting forth, among other things:—

"1. A denial that the statute had barred the action.

"2. Further replying, plaintiff alleges that said defendant is now, and for fifteen years last past has been, a non-resident of Nebraska, and has visited this state at intervals, remaining here but a few days at a time, the aggregate of which time, during said period, would not exceed ninety days.

"3. That the lots described in the answer lie within a general inclosure, including eighty acres and upwards, composed of numerous and similar lots, some of which defendant owns in fee, others he holds as co-tenant of an undivided moiety, and others still that he neither holds nor claims to hold adversely.

"4. That said lots lie within the corporate limits of the city of Florence, and, as designated on the recorded plat thereof, are entirely surrounded by streets dedicated to the public, and that the fence comprising the general inclosure, as above stated, is not on the line of said lots, nowhere touches any of them, and that none of said lots are inclosed or surrounded by a fence."

"6. That neither said defendant nor any one else has been in the actual possession of said premises at any time during the period mentioned in said answer. The testimony shows that the defendant lived in the city of Florence and at his home just outside of Florence, which is known as the Parker

homestead, and of which this property forms a part, continuously from the year 1856 down to 1878; that since the latter date he has resided at Davenport, Iowa, but has made very frequent visits to his old homestead near Florence, at intervals of from two to four months, remaining there each visit from a few days to as long as one month; that one or more of his family has, all the time since defendant's removal to Davenport, been on the Florence homestead, with authority to represent defendant there as agent in all matters pertaining to his property interests, and has been in the actual occupancy of 'outlots 226 and 227.'"

The testimony shows that in the year 1865 defendant received and placed upon record a tax deed to said "outlots" 226 and 227, and paid the unpaid taxes against them, which extended back to the year 1859, and has ever since paid the taxes thereon; that in the spring of 1866 he sowed these lots with blue-grass seed, and subsequently used the same as a pasture, for which they are best adapted and most profitable. At first his stock was herded upon these lots every year, excluding the claims of all others, and later the lots were inclosed by a substantial fence, in 1873 and 1874, and they have been kept fenced and been used as a pasture all the time to the commencement of plaintiff's action.

In *Blodgett v. Utley*, 4 Neb. 25, the case of *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128, was cited with approval, so far as it relates to a suspension of the running of the statute, and it was held, in effect, that if the right to bring an action during the defendant's absence was not suspended, that the statute was not available as a defense. That case has not, so far as we are aware, been questioned. The question was carefully considered, and we believe the decision is right, and it will be adhered to.

Now, aside from section 17 of the code, was the right of action suspended during the defendant's absence? We think not. While the possession, to be adverse, must be actual as contrasted with constructive possession, yet such possession may be by an agent or tenant: 1 Am. & Eng. Ency. of Law, 254, and cases cited. Actual possession is simply having the property in the immediate control or power of the party; when applied to land, it means an actual entry and occupation thereof. This occupation may be disclosed by the appropriate use of the property according to its quality and condition, and may be by fencing and pasturing the land, by cultivation and

payment of taxes, claiming to be the owner thereof. This occupation, if begun by a person by actual entry, may be continued by him by his agents or servants, because he is thus retaining the possession through them: 1 Am. & Eng. Ency. of Law, 184 g, 184 h, and cases cited. The absence of the defendant from the state did not suspend the right of the plaintiff to bring an action to recover the possession of the land in question. The land was in Douglas County, and in the possession of the defendant, through his agent, and the plaintiff could have proceeded against him and his agents to recover the possession: *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767. Having failed to do so, the action is barred. The judgment of the court below is right, and is affirmed.

LIMITATIONS OF ACTIONS—EFFECT OF ABSENCE FROM STATE UPON.—Absence of a party from the state stops the running of the statute of limitations as to causes against him, but not as to those in his favor: *Stone v. Hamwell*, 83 Cal. 547; 17 Am. St. Rep. 272. The statute of limitations does not run in favor of a defendant while he is absent from the state, no matter if he was absent when the cause of action accrued; and whenever he departs from the state after having come into it, the running of the statute is suspended from that time, and during his absence: *Stanley v. Stanley*, 47 Ohio St. 225; 21 Am. St. Rep. 806, and note; extended note to *Moore v. Armstrong*, 36 Am. Dec. 72.

ADVERSE POSSESSION—POSSESSION OF TENANT OR AGENT THAT OF LANDLORD OR PRINCIPAL.—The connected, successive, and continuous possession of a landlord by his tenant, his heirs and their grantees, may be tacked together so as to form a continuous and uninterrupted possession adverse to the true owner for the period required by the statute: *Ramsey v. Glenny*, 45 Minn. 401; 22 Am. St. Rep. 736. The possession of a tenant or agent employed to hold possession is the possession of the person under whom he holds: *McColman v. Wilkes*, 3 Strob. 465; 51 Am. Dec. 637; *McLean v. Smith*, 106 N. C. 172. Possession by a tenant is the same in all respects as if by the party himself: *Thomas v. Burnett*, 128 Ill. 37.

RUBLEE v. DAVIS.

[38 NEBRASKA, 779.]

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—BONA FIDE HOLDER.—A holder of negotiable paper, who purchases it before maturity, for a valuable consideration, in the ordinary course of business, with knowledge that it was made in consideration of an executory contract of warranty between the original parties, but without knowledge of the failure of the warranty, or of facts sufficient to put him on inquiry until after his purchase, takes it free from any defense by the maker because of the breach of warranty.

NEGOTIABLE INSTRUMENTS — BONA FIDE HOLDER. — One who purchases negotiable paper before its maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, or which ought to excite suspicion in the mind of a prudent man, is a *bona fide* holder, and takes the paper free from defense on the part of the maker.

E. J. Clements and C. A. Munn, for the plaintiff in error.

E. J. Babcock and H. E. Babcock, for the defendant in error.

NORVAL, J. This suit was brought in the county court of Valley County, by the plaintiff in error, to recover the amount of two promissory notes, dated May 4, 1885, due thirteen months after date, one for \$200 and the other for \$150, payable to J. F. Coleman or order, and executed by the defendants. The petition is in the usual form when an action is brought by an indorsee of a promissory note against a maker.

The answer sets up that the notes were given as part consideration for a jack purchased by the makers of the payee; that the animal was warranted to be a sure foal-getter; and the defendants aver that the warranty has failed, and that the plaintiff purchased the notes with notice of and subject to the equities of the makers. The reply denies every allegation of the answer.

The cause was tried in the county court without a jury, and a judgment was rendered in favor of the defendants.

At the request of the plaintiff, the county court made special findings of facts, which are set out in full in the transcript. The plaintiff prosecuted a petition in error to the district court, where the judgment of the county court was affirmed, and the plaintiff brings the cause here for review on error.

The sole question to be decided is this: Is the judgment of the county court sustained by the findings of fact? The facts found by the county court are as follows: —

1. That the notes set forth in plaintiff's petition were given by the defendants H. S. Davis and A. Francis Davis at the time and in the manner set forth in said petition, and were secured by a chattel mortgage on a jack.

2. That said notes were given for the purchase price of a certain jack, and a part consideration for the giving of said notes was the warranting of said jack to be a sure foal-getter by said Coleman.

3. That a bill of sale of said jack, containing a warranty that he was a sure foal-getter was given by said J. F. Coleman to Henry S. Davis and A. Francis Davis, which bill of sale

was recorded in the county clerk's office of Valley County on the fifth day of May, 1885.

4. That said notes were purchased of said J. F. Coleman by plaintiff, without fraud on his part, on or about the first day of June, 1885, in the ordinary course of his business, and the plaintiff paid therefor the sum of two hundred dollars, being the reasonable and fair value of said notes at that time, and that said notes were indorsed by said Coleman.

5. That before plaintiff purchased said notes, he knew that they were given in payment of the purchase of a certain jack, and was told by witness Johnson that the value of said jack depended wholly on his being a sure foal-getter, in answer to an inquiry of plaintiff as to the security on said notes.

6. That before plaintiff purchased said notes, he was told by the defendant H. S. Davis that he would give no further security on said notes unless he knew whether the jack was as represented and guaranteed by Coleman.

7. That the plaintiff had no actual notice of the bill of sale and the warranty therein contained, which were recorded as aforesaid, and no actual knowledge of any of the facts, save in the conversation had with the witness Johnson and defendant H. S. Davis.

8. That said jack was brought into Valley County from Missouri a short time before Coleman sold him to the Davises, and that neither H. S. Davis, A. Francis Davis, nor the plaintiff knew at the time plaintiff purchased said notes that there was a failure of consideration or a breach of said warranty, and that neither of said parties knew, nor had any means of knowing, of said breach of warranty or failure of consideration until late in the fall of 1885.

Is the defense of breach of warranty available against the plaintiff? A holder of negotiable paper, who purchases it before maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, is regarded a *bona fide* holder and takes the paper free from defense on the part of the maker. This court said, in *Dobbins v. Oberman*, 17 Neb. 163, that "to defeat a recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part."

Testing the facts in the case before us by this rule, are they

sufficient to defeat the action? It appears from the finding of facts that the plaintiff purchased the notes in suit of the payee in good faith, in the ordinary course of his business, before due, and paid for them their reasonable and fair value. True, he was aware, when he took the notes, that they were originally given in payment of a jack sold by the payee to the makers, and that the animal was warranted by the seller, but he had no knowledge that there was a breach of warranty, nor were the facts or circumstances brought to his knowledge sufficient to charge him with notice thereof. At the time the notes were indorsed to the plaintiff, it was not known to the makers that there would be a breach of warranty, so had inquiry been made of the defendants, at or prior to the purchase of the paper, the plaintiff would not have ascertained that any defenses existed against the same. Although the plaintiff knew when he bought the notes for what they were given and that the jack was warranted, that fact alone is not sufficient to prevent the plaintiff from being a *bona fide* holder. To have that effect, he must also have known when he bought the notes that the warranty had failed, or possessed knowledge of facts sufficient to put him upon inquiry, which, if followed, would have led to its discovery. This the record fails to disclose. It only inferentially appears that there has been a breach of the warranty, and there is no finding of fact as to the actual value of the jack. Unless he was entirely worthless and possessed no value, there could not have been an entire failure of the consideration given for the notes. While it is doubtless true that the value of a jack depends largely upon his capability to produce foals, yet we cannot take judicial notice that where a jack is not a sure foal-getter he has no marketable value.

The case of *Miller v. Ottaway*, 81 Mich. 196, 21 Am. St. Rep. 513, cited by plaintiff in error, is quite in point. That was a suit upon a negotiable promissory note, given for a span of mares and two colts. The mares were warranted by the seller to be with foal. The plaintiff purchased the note before maturity, paying full value therefor; and while he knew, at the time, of the warranty, he had no knowledge of its breach. The defendant did not know that the mares were not with foal until some time after the transfer of the note. The court, after quoting from *Parsons on Bills and Notes*, and citing numerous authorities, in the opinion, say: "From the foregoing authorities, and upon reason, the correct doctrine appears to

be, that it is not a good ground of defense against a *bona fide* holder for value that he was informed that the note was made in consideration of an executory contract, unless he was also informed of its breach. If he had knowledge of the breach, the defense may be interposed. . . . The note in question being valid in its inception, and not subject to any condition, a collateral agreement to warrant the mares to be with foal cannot be set up as a defense to the action in this case, where the plaintiff purchased in good faith for value, and without notice or knowledge of any breach of the warranty. A mere collateral agreement or warranty, made at the time the note was given, does not affect the validity or negotiability of the note, although the purchaser before maturity may know of such agreement."

None of the cases cited upon the brief of defendant in error are applicable to the state of facts existing in this case. There is nothing to show bad faith or want of honesty of purpose on the part of the plaintiff in the purchase of the note. He is an innocent purchaser, and the breach of warranty is no defense to the action. The judgments of the district and county courts are reversed, and the cause remanded for further proceedings.

NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASERS — WHO ARE. — The possession of a negotiable instrument, acquired in good faith and in the usual course of business, constitutes the holder a purchaser, whether the person from whom he received it had title or not: *Wilson v. Denton*, 82 Tex. 531; 27 Am. St. Rep. 908, and note with cases collected; note to *Rice v. Jones*, 14 Am. St. Rep. 809; extended notes to *Kelly v. Whitney*, 30 Am. Rep. 701; *First National Bank v. County Commissioners*, 100 Am. Dec. 196; *Bay v. Coddington*, 9 Am. Dec. 272. One who takes by indorsement a negotiable promissory note before its maturity in payment of an existing debt is a *bona fide* holder thereof: *Hefron v. Cunningham*, 76 Tex. 312.

OVERTON BRIDGE COMPANY v. MEANS.

[88 NEBRASKA, 857.]

CORPORATIONS — EXECUTIONS AGAINST. — The property of a public corporation, such as a railroad or bridge company, which is essential to the exercise of its corporate franchise and the discharge of the duties it has assumed towards the general public cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution or in pursuance of an order or decree of court. The only remedy of the judgment creditor in such case is to obtain the appointment of a receiver and a sequestration of the company's earnings.

C. W. McNamar, for the appellant.

O. A. Abbott, for the appellees.

Post, J. The plaintiff, the Overton Bridge Company, is a corporation organized for the purpose of constructing and maintaining a toll-bridge over the Platte River, near the village of Overton, in Dawson County. In the fall of 1886 it entered into a contract with the defendant Means, in pursuance of which the latter erected the bridge in controversy, on the range line between the ranges 19 and 20. Soon after the completion of said bridge, the proper authorities of Dawson and Phelps counties opened a road along said range line and over said bridge, and said bridge has been used by the public ever since as a highway. For the purpose of assisting in the building of said bridge, Overton precinct, in Dawson County, voted to issue the bonds of said precinct in the sum of six thousand dollars. Said bonds were subsequently issued and delivered to the plaintiff company, and by it turned over to defendant Means, in part payment of the amount due under his contract. There being a further sum due on said contract, defendant brought suit in the district court of Dawson County, and on the twenty-sixth day of April, 1888, recovered judgment against the plaintiff company for \$2,681 and costs. Afterward, an execution was issued and placed in the hands of the defendant Taylor, as sheriff of Dawson County, who levied upon the bridge in controversy as real estate to satisfy said execution, said company having no other property. The plaintiff thereupon filed its petition in the district court of Dawson County, by which it seeks to have defendant perpetually enjoined from selling said bridge to satisfy the aforesaid judgment. On final hearing, the district court entered a decree enjoining the sale of the bridge on said execution, but ordered the defendant Taylor, as a special master, to sell said bridge and all the

rights of the plaintiff company to maintain the same, including its franchise, for the purpose of satisfying the judgment aforesaid. From that decree plaintiff has appealed to this court.

We have not been referred to any provision of statute which will authorize the seizure and sale of the bridge in controversy to satisfy an ordinary judgment at law, either upon execution or decree of a court of chancery. If the decree of the district court can be upheld, it must be, therefore, by an application of the principles of the common law. We have, in our investigation of the question involved, found no case the doctrine of which sustains the contention of defendant. On the other hand, we believe the rule deducible from all the cases may be safely stated as follows: The property of strictly private corporations, such, for instance, as manufacturing, mining, and trading companies, and perhaps those in which the public is indirectly interested, as libraries, hospitals, and the like, is liable to be taken on execution precisely as the property of an individual debtor, but the property of corporations which are classed as public agencies, such as railroad and bridge companies, which is essential to the exercise of their corporate franchise and the discharge of the duties they have assumed toward the general public, cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution or in pursuance of an order or decree of court: *Gooch v. McGee*, 83 N. C. 59; 35 Am. Rep. 558; *Baxter v. Nashville etc. Turnpike Co.*, 10 Lea, 488; *Louisville W. Co. v. Hamilton*, 81 Ky. 517; *Palestine v. Barnes*, 50 Tex. 538; *Gue v. Tidewater Canal Co.*, 24 How. 257; *Seymour v. Milford & C. Turnpike Co.*, 10 Ohio, 476; *Foster v. Fowler*, 60 Pa. St. 27.

It is said by Morawetz, in his work on private corporations, section 1125: "If a corporation has received aid from the government for a public purpose, any property of the company necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public, and cannot be seized and sold by the creditors of the company under execution. Property acquired by the company by purchase, if not necessary to enable it to perform its duties to the public, may be taken under an attachment or execution; but after exhausting this class of property, the only remedy of a judgment creditor is to obtain the appointment of a receiver and a sequestration of the company's earnings."

The privileges conferred by law upon corporations to con-

struct railroads, canals, bridges, etc., are conferred with a view to the use and accommodation of the public, and to permit the property necessary for the accommodation of the public to be taken and sold by creditors would be to defeat the prime object of the statute which endows such companies with corporate existence. The bridge in this case was, on its completion, dedicated to the use of the public, as was intended from the first, and has continued to be, and is now, a part of the public highway of the state; and it is not the policy of the law to permit it to be diverted from such use.

The judgment is reversed, and the cause remanded to the district court, with directions to enter a decree in accordance with the prayer of the petition.

EXECUTION AGAINST CORPORATE FRANCHISES. — Execution cannot be levied on corporate franchises and rights or on property essential to the enjoyment thereof: *Susquehanna Canal Co. v. Benham*, 9 Watts & S. 27; 42 Am. Dec. 315, and note. A turnpike road is not the subject of levy under execution, where the defendant has no interest in the land and no right save that of maintaining the road and receiving tolls: *Annamant v. New Alexandria etc. Turnpike Road*, 13 Serg. & R. 210; 15 Am. Dec. 598, and extended note.

CASES
IN THE
SUPREME COURT
OF
OHIO.

SHAHAN v. SWAN.

[48 OHIO STATE, 25.]

EVIDENCE — THE ORDER IN WHICH EVIDENCE SHALL BE INTRODUCED may be determined by the trial court, in the exercise of a sound discretion, and the fact that parol evidence of the terms of an alleged contract was received before evidence was offered showing acts of part performance does not entitle the losing party to a new trial or a reversal of the judgment, if evidence of such performance is afterwards offered and received.

APPELLATE PRACTICE — QUESTIONS OF FACT. — The supreme court of Ohio will not examine the evidence before a trial court, except to the extent of determining whether the finding of such court was supported by any evidence. If the evidence upon which the finding of the court was based consisted of proof of declarations of parties long since deceased, made at a remote period of time to persons who are now very aged, and who had no interest in the matter or in preserving such declarations in their memories, yet if such evidence satisfies the trial court of the existence of such declarations, the appellate court will not interpose to set aside a finding based thereon.

STATUTE OF FRAUDS. — ACTS OF PART PERFORMANCE which will take a parol agreement out of the statute of frauds must be such as clearly refer to some contract in relation to the subject-matter in dispute. If all the acts done are of such a character that they do not indicate that they were done in the performance of any contract or agreement respecting property rights of any kind, but were rather the manifestation of a benevolent and affectionate disposition on the part of a childless couple towards a grateful and affectionate child, placed in their custody by a destitute and homeless mother, then such acts cannot be referred to an alleged parol agreement to make such child their heir and leave it their property.

STATUTE OF FRAUDS. — A PAROL AGREEMENT BETWEEN A MOTHER AND A CHILDLESS COUPLE, to the effect that if she will give them her infant, and surrender all right to its custody, and forever conceal from it the fact of her motherhood, they will adopt and keep such infant as their child and heir, and that at their death it shall succeed to all their prop-

erty, will not be specifically enforced in equity, though the mother surrendered her child as stipulated, and it was received by the couple and raised as their child and given their name and resided with them until married with their consent, the child on its part performing all the duties usually performed by an affectionate child for and towards its parents. These various acts cannot be regarded as a part performance of the contract sufficient to take it out of the statute of frauds, because they are not necessarily referable to it, but are acts such as may have been prompted merely by benevolence and affection.

H. H. Greer, Dirlam and Leyman, and Theodore Hall, for the plaintiff in error.

Critchfield and Graham, Estep and Dickey, Selwyn N. Owen, and W. W. Boynton, for the defendant in error.

BRADBURY, J. The pleadings in the action, together with the findings of the court, show that Mary J. Swan, the defendant in error, in the year 1840, being then about two years old, and living with her mother, a woman in humble circumstances, near Worthington, Ohio, attracted the notice of James E. Woodbridge and his wife, who resided in Mt. Vernon, Ohio, were in prosperous circumstances, childless, and without expectation of children being born to them; that the Woodbridges, then visiting at Worthington, entered into negotiations with the mother respecting her said child, which resulted in the mother yielding to them the person of the child, and their carrying her home with them on their return; that they gave their name to the infant, and entered in their family Bible her birth, as their own offspring; that they reared her tenderly, taught her to believe that she was their child by birth, and carefully educated her; that when she reached a suitable age they introduced her into society as their own daughter; that she was an affectionate and dutiful child, and in all respects discharged the duties of a daughter, and continued to reside in the family until her marriage, at which ceremony she was given away by James E. Woodbridge as his daughter; that in August, 1874, James E. Woodbridge died intestate, having made no provision for the defendant in error, and his property, real and personal, passed to his wife, who survived him a few months, and who, by will, made some provision for defendant in error, but devised to others the bulk of the property that came to her from her husband, said James E. Woodbridge.

The questions made during the progress of the action in the circuit court are numerous, and many of them interesting,

most of which have been elaborately and ably presented to this court in the briefs of counsel. However, according to the view we have taken of the case, it has not been found necessary to discuss or determine all of them, and we have therefore confined ourselves to such of the questions as we deemed most material in deciding the cause.

We are confronted at the door of the inquiry in this case with the question whether the contract set up in the petition, even had it been in writing, and signed by the party to be charged with its performance, created such a right or interest in his estate as to entitle defendant in error to its specific performance, or whether it is not rather to be regarded as partaking of the nature of a personal agreement, the violation of which would only entitle the party aggrieved to an action for damages. The contract provides, generally, that she shall be made the heir of Mr. Woodbridge, and shall succeed to his property at his death. It can hardly be contended that this created an estate or interest in her to or in the particular parcels of property, real or personal, owned by him at the time it was made, or that any such interest or estate attached to specific parcels of after-acquired property as it may have been successively acquired by him; if so, he would have been deprived of the power of disposing of it so as to bar her right, except to one who might take for value and without notice. This cannot reasonably be supposed to have been within the contemplation of the parties. Neither does any plan seem to have been in the minds of the parties by which this heirship and succession should be brought about. It could not be done by the laws of descent, for there was then no statute authorizing an adoption; only heirs by blood could acquire property in that way. Did they contemplate a will or some conveyance, in escrow perhaps, to be delivered and become operative upon the death of Mr. Woodbridge? Did they foresee or intend the consequences that either method would have on the rights of Mrs. Woodbridge? To these questions no answer can be returned; not even the slightest cue to their solution can be found in the history of the transaction.

If the contract created a personal obligation only, then its breach would entitle the party injured, not to its specific performance, but to an action for damages, measured by the value of the estate she should have succeeded to, in which case the action should have been brought against the estate of James E. Woodbridge, after the claim had been presented and re-

jected, and would be subject to the limitation in favor of executors and administrators provided in section 6113, Revised Statutes. While the determination of this question — whether the contract is one that, in any event, would be specifically performed — against defendant would be decisive of the case, we prefer to place the decision upon the determination of another question, equally decisive, and about which we have no doubt.

If the contract should be treated as divisible, so that, to the extent which it related to the personalty, no note or memorandum in writing would be required by the clause of the statute of frauds relating to the sale of lands, and be held to be capable of performance within a year, so as not to be obnoxious to the clause of the statute relating to contracts not so capable of performance, then the omission of Mr. Woodbridge to provide for her succession to it is but the breach of a contract relating to personalty which can be compensated in damages, and she would have a claim against his estate for the amount thereof, which, as has already been seen, must have been presented to his personal representative before an action could be brought, and would be subject to the four years' limitation provided in section 6113, Revised Statutes.

The action before us, however, is not of that character, but is, in all essential particulars, one for the specific performance of the contract set forth in the petition; and that contract, we think, is entire. Whatever the defendant in error and her mother were to do applied equally to every part of that which the Woodbridges were to perform, and as it concerns an interest in lands, it is required by the statute of frauds to be in writing, subject, of course, to the rule that permits certain acts of part performance to withdraw it from the operation of the statute.

The circuit court, on the trial of the action, admitted, over the objections of plaintiff in error, parol testimony of the terms of the alleged contract, before evidence was introduced, showing acts of part performance. This, it is claimed, is error, for which the judgment should be reversed. In support of this view they cite the cases of *Lindsay v. Lynch*, 2 Schoales & L. 1, *Maddison v. Alderson*, L. R. 8 App. C. 467, *Dale v. Hamilton*, 5 Hare, 369, and some others, as well as the most distinguished text-writers on the subject of the specific performance of contracts. The authorities are too numerous to render practicable their review in detail, but an examination of them will

show that the order in which evidence should be admitted was not under discussion, but rather the effect to be given to it when received, and the holdings and opinions were, that parol proof of the terms of the parol contract should not be considered as affecting the rights of the parties until part performance of the contract had been established. The statement of the case as well as the language used by the chancellor in the case first cited (*Lindsay v. Lynch*, 2 Schoales & L. 1) discloses that the parol evidence of the contract had in fact been admitted, the lord chancellor (Lord Redesdale) saying: "The statute of frauds prohibits my entering into the evidence of Blake on the subject,"—Blake having already testified to the terms of the parol contract in dispute.

In practice, it would be impracticable to defer hearing parol evidence of the terms of a parol contract respecting land until the court ascertained that it had been partly performed; it would involve the necessity of hearing the case in detail and considering one branch of the evidence before the remainder of it was admitted at all. And whatever the rule may be elsewhere, in Ohio the practice is to permit a party to introduce all the evidence he can produce that is pertinent to the issue on trial, the order of its introduction to be determined by the court, in the exercise of a sound discretion.

One of the facts in issue on the trial in the circuit court was, whether a contract had been made as set forth in the petition. The evidence objected to, and admitted over the objection, was pertinent to that issue, and therefore admissible in the first instance, though it could have no effect until the contract had been taken out of the operation of the statute of frauds by proof of part performance.

The principal contention had in the circuit court over the facts of the case was in respect to proof of the parol contract set forth in the petition, the defendant in error contending that she was given to the Woodbridges by her mother, under a contract to the effect that if her mother should forever renounce all claim and right to her care and custody, and keep secret the fact of her motherhood, Woodbridge and wife would adopt and keep her as their own child and heir, and that at the death of said James E. Woodbridge she should succeed to the title and possession of all his property. On the other hand, plaintiffs in error contended that the Woodbridges, desiring an object upon which to bestow their affections, and influenced by feelings of benevolence and sympathy for her unfortunate

condition in life, relieved her mother of the burden of her care and maintenance, as an act of pure charity, without entering into any contract in respect thereof.

The circuit court determined this contention in favor of the defendant in error, finding from the evidence that she was taken by the Woodbridges, maintained and educated by them, pursuant to the contract asserted by her. Counsel for plaintiffs in error earnestly and vigorously urge this court to review that finding. They insist that the arrangement, whatever it may have been, was by parol; that no living witness to its terms was produced at the trial; that both of the Woodbridges were then dead, and the mother had not been heard from for forty years; and that the only evidence of its terms were the declarations of Woodbridge, made more than forty years before the trial, and since carried in the memory of persons having no interest in the matter, and who had reached an extreme old age at the time they testified. These statements of counsel are borne out by the record. We do not doubt the soundness of the propositions that evidence of this character is frequently unsatisfactory, and at all times requires careful examination and close scrutiny, and that estates of deceased persons should not be diverted from their lawful channels of descent by other than convincing evidence. But we know of no absolute rule of law that, in this state, limits the effect to be given to the evidence of the declarations made by deceased persons. That, like all other evidence, should receive the credit that inherently belongs to it, — neither more nor less.

The duty, however, of hearing and considering the weight of the evidence and determining questions of fact is not cast upon this court by the statutes of the state defining and prescribing its duties, but is thrown upon the circuit court in cases of the character of the one before us. We must assume that the circuit court approached the performance of its duty in this particular, fully comprehending the danger to be apprehended from the class of testimony on which defendant in error relied to support her petition; and that the court, knowing that the tenor of the evidence of even an honest witness might be entirely changed by the lapse of a word or sentence during the thirty or forty years that elapsed between his hearing Mr. Woodbridge's statement and his repeating it on the witness-stand, gave to such evidence all the scrutiny its nature required. And further, we must also assume that that court comprehended the danger that waits upon all attempts to

divest the heir of his inheritance by diverting the descent of estates from their regular and legal channel by other than convincing evidence. That court had the witnesses before it, observed their deportment, gauged their intelligence, and was possessed of all those other advantages that attend a court placed face to face with the witness undergoing examination. Evidence that seems extremely slight to a tribunal having before it only the written statement of a witness may be reasonably satisfactory to one who had the witness before it in person.

The court, however, will, in a proper case, examine the evidence in a case before it, to determine if there was any evidence to support the finding of the trial court. We did so in this case; and the bill of exceptions discloses evidence which, if believed in the exact terms in which it was delivered, is sufficient to support the finding in this particular.

The circuit court also found "that such part performance was had of such contract, by the parties thereto, and by the plaintiff, in the rendition of such service and the performance of such duties, as to take the case out of the operation of the statute of frauds."

The acts found by that court, and held by it to constitute part performance of the contract, are as follows: "That the mother of the plaintiff, in pursuance of said contract, surrendered the care, custody, control, and education of the plaintiff to said James E. Woodbridge, when she was about two years of age, and forever concealed from the plaintiff the fact of her motherhood, and wholly gave up its society and custody; and the said James E. Woodbridge continued the care, custody, control, and education of the plaintiff until she became of age, and thereafter she continued to live in his family, continuously bestowing on said James E. Woodbridge and Lydia, his wife, all the affection and performing all the services of a daughter until she was, by said James E. Woodbridge, given away as his daughter in marriage in the year 1870. The said James E. Woodbridge and Lydia, his wife, carefully concealed from said plaintiff the fact that she was not their daughter, the said Lydia breaking the news of that fact to her for the first time on the day after said James E. Woodbridge was buried.

"The court further find that the plaintiff, during all those years, was kind, affectionate, and obedient to both the said James E. Woodbridge and Lydia, his wife, and did perform about the house those domestic services, did render those do-

mestic duties, and did perform those offices of kindness and affection which a daughter usually renders for parents to whom she is attached or bound by the ties of blood and affection; that said James E. Woodbridge entered in the family Bible the name 'Mary J. Woodbridge, born February 2, 1838,' as the designation of parentage and date of birth of said plaintiff."

A large proportion of the elaborate briefs of counsel is devoted to the discussion of the sufficiency of these acts to constitute such part performance of the contract as will take it out of the statute of frauds. The adjudications upon the subject are innumerable, and not always in harmony with each other, and they have been supplemented by the reasonings of a large number of able text-writers. The authorities, in the main, if not exclusively, support two rules upon the subject, the more strict of which requires the acts of part performance to be referable to the contract set up, and to no other one. *Lindsay v. Lynch*, 2 Schoales & L. 1, is the leading case in support of the stricter rule.

The greater number of authorities, however, and as we think the better reason, is satisfied if the acts of part performance clearly refer to some contract in relation to the subject-matter in dispute; its terms may then be established by parol.

"First, then, it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character of the contract; they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow": Fry on Specific Performance, sec. 558. See also Brown on Statute of Frauds, sec. 455; *Forster v. Hale*, 3 Ves. 712; Pomeroy on Specific Performance, sec. 107; *Anderson v. Chick*, 1 Bail. Eq. 118; *Rathbun v. Rathbun*, 6 Barb. 98; *Stoddard v. Tuck*, 4 Md. Ch. 475; *Semmes v. Worthington*, 38 Md. 298; *Carlisle v. Fleming*, 1 Harr. (Del.) 421.

Usually, possession is the act of part performance relied on to take a case out of the operation of the statute of frauds; that, of course, always discloses the subject-matter to which it refers, and courts, in discussing its sufficiency, have no occasion to expressly declare that an act of part performance must refer to the subject-matter of the contract in dispute, but it is

apparent that such qualification is always understood. Surely, acts that refer to some contract between the parties respecting a totally different subject-matter than the one in dispute would not take the case out of the operation of the statute. The very object of admitting proof of part performance is to show, not that there is some contract between the parties about something, but that there is some contract between them about the subject-matter in dispute, in order that the contract set up respecting it may be established by parol. In *Maddison v. Alderson*, L. R. 8 App. C. 467, on page 476, Lord Chancellor Selborne says that the statute does not apply where the right to relief grows out of "equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute"; and on page 491 Lord Fitzgerald says: "The lord chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and I may add, must necessarily relate to and affect the land, the subject of that agreement." This is an instructive case respecting the doctrine of part performance in cases of the character of that before us. A woman had been induced, by a promise to leave her an estate for life in land, to serve the intestate as his housekeeper, without wages, for many years, and to give up other prospects of an establishment in life. The denial to her of a specific performance of the contract she set up was a great hardship to her, but little, if any, less than it is claimed defendant in error will sustain if relief is denied her in the case before us.

The mother of the defendant in error was a servant-girl, burdened with the support of an illegitimate child of the age of about two years. The Woodbridges were prosperous people without children, or the hope of any. The mother gave them the child, and never afterwards revealed her motherhood. The Woodbridges received the infant, reared her tenderly in all respects as if she were their own daughter, used great diligence in guarding from her any knowledge that she was not of their blood, and she in turn repaid this kindness by giving them the affection and performing the duties of a daughter. Acts of this character are not usually the offspring of contract-

ual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives? Even if we acquit the mother of any desire to conceal the evidence of her shame, or to escape the burden of supporting her infant, yet might we not expect at her hands, from motives of maternal affection alone, just what she did? If she kept the child, the stigma of its birth would cling to it through life, and it would face a life of poverty, if not of actual want; to give it to the Woodbridges and conceal its birth would be to remove that stigma for which she was responsible, and open up to it a useful and honorable future. Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or agreement respecting property rights of any kind, but rather were the manifestations of a benevolent and affectionate disposition on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping by a mother who was in destitute circumstances and homeless herself.

The case of *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 143, is in many respects like the one before us. And the reasoning of the court in that case would entitle the defendant in error to the relief demanded. In that case, however, the learned chancellor gave but slight attention to the principles that underlie and support the doctrine of part performance of parol contracts; he simply recited the mutual acts of the parties, and assumed that they constituted such part performance as would take the case out of the operation of the statute. The doctrine of that case (*Van Dyne v. Vreeland*, 11 N. J. Eq. 370; 12 N. J. Eq. 143) finds support in *Rhodes v. Rhodes*, 3 Sand. Ch. 279, *Sutton v. Hayden*, 62 Mo. 101, and some other cases in that state. But it is repudiated in *Wallace v. Rappleye*, 103 Ill. 229; *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222. Much stress, in some of the cases relied on by defendant in error, is laid on the circumstances that the services rendered by the parties seeking specific performance were not capable of being measured, nor intended to be measured, by any pecuniary standard, and therefore, as the party had no adequate remedy at law, an exception should be grafted on the general rule, that the payment of the consideration will not take a case out of the statute.

This general rule is well established in Ohio: *Sites v. Keller*, 6 Ohio, 488; *Pollard v. Kinner*, 6 Ohio, 528. And the rule in

this state is not affected by the circumstance that consideration was paid by personal services: *Howard v. Brower*, 37 Ohio St. 402; *Crabill v. Marsh*, 38 Ohio St. 331.

Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal services of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the statute of frauds, we do not wish to be understood to hold that cases may not arise wherein specific performance of a contract in parol may be had, on the ground that the consideration had been paid in personal services, not intended to be, and not susceptible of being, measured by a pecuniary standard.

What we hold in the case before us is, that although the services rendered by the defendant in error may have been of such character, yet the circumstances under which they were rendered, when considered in connection with the other alleged acts of part performance, do not indicate that they were done pursuant to any contract or agreement whatever relating to property; and that this class of cases does not call for any further relaxation of the rule requiring proof of acts of part performance to take a case out of the operation of the statute of frauds. This, too, is an extreme case of its class. The contest is over an estate valued at about forty thousand dollars. The defendant in error claims to succeed to it all by virtue of the terms of a parol contract made when she was a small infant, forty-six years before the trial in the circuit court. The only persons to whom the terms of the alleged contract were confided were her own mother, who, at the time of the trial, had not been heard from for over forty years, and her foster parents, James E. Woodbridge and wife, both of whom were dead; and the only proof of its terms was the declarations of Mr. Woodbridge, casually made to persons having no pecuniary interest in the matter, over forty years ago.

The judgment of the circuit court is reversed, and the petition dismissed, at the costs of the defendant in error.

TRIAL — ORDER OF EVIDENCE. — The order of evidence is within the sound discretion of the court: *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731; *Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and note. The court cannot dictate the order in which a party shall put in his evidence as to a question of fact: *Lewis v. Schoenn*, 93 Mo. 26; 3 Am. St. Rep. 511.

TRIAL. — The appellate court will not disturb findings of the trial court when there is evidence sufficient to justify them: *Devlin v. Quigg*, 44 Minn.

534; 20 Am. St. Rep. 592; *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Bockenstedt v. Perkins*, 73 Iowa, 23; 5 Am. St. Rep. 652, and note.

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS. — An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property upon their death: *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270, and note. In *Pond v. Sheehan*, 132 Ill. 312, the court refused to enforce specific performance of a somewhat similar contract, on the ground that the adopted child had never been in possession of the real property which the adopters had promised to devise.

COLUMBUS AND HOOKING COAL AND IRON COMPANY v. TUCKER.

[48 OHIO STATE, 41.]

A CORPORATION AUTHORIZED BY ITS CHARTER TO MINE COAL has no greater rights than those of private persons engaged in the same business, and must, to the same extent as private persons, so carry on its business as not to injure other persons in the enjoyment of their property rights.

COAL MINERS — DUTY OF, WITH RESPECT TO DÉBRIS. — If a corporation authorized to mine for coal so places its slack and refuse upon the surface of its own land that they may be expected, in the ordinary course of events, to wash down and finally reach the lands of others, to their damage, such corporation is liable to the land-owner injured by the washing of such slack and refuse into a creek passing through his land, causing it to overflow its banks, inundate his land, and cover parts of it with *débris*; nor can the company escape liability on the ground that what it did was necessary to the successful conduct of its business.

A USAGE WHICH IS NOT ACCORDING TO LAW, though universal, cannot be set up to control the law.

NEGLECT — CUSTOM. — One charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or placed in like circumstances, or owing similar duties.

A CUSTOM OF COAL MINERS TO SO PLACE SLACK AND OTHER REFUSE from their mines that they may be washed down upon and injure the lands of others is not lawful, and constitutes no defense to an action by a land-owner to recover damages resulting to him from slack and refuse being so placed that it was washed down upon and injured his land.

STATUTORY NUISANCE — COMMON-LAW REMEDY FOR. — When a statute has declared that certain acts constitute a nuisance, and that any person intentionally doing them shall be deemed guilty of a misdemeanor, the common law, if an individual is injured, will supply a civil remedy, though the statute gives none.

ACTION by Tucker against the Columbus and Hooking Coal and Iron Company to recover damages for injuries to his land. The defendant was an Ohio corporation. The plaintiff owned a tract of land through which flowed Monday Creek. The

channel of this creek, until after the acts of the coal company, had been of sufficient capacity to carry its waters, except during unusual freshets. The defendant placed the slack, dirt, and other refuse from its mine at such place upon its lands that they were carried off by various natural streams thereon emptying into Monday Creek, and the effect of their being emptied in this latter creek was the filling of its channel through the plaintiff's farm, causing it to overflow its banks, inundate plaintiff's land, covering a portion thereof with *débris*, and rendering it valueless. The defendant insisted that its mining operations were conducted in a prudent and careful manner, and in the mode generally employed in operating similar mines in the neighborhood; that its acts were not characterized by any malice or negligence towards the plaintiff; and that the deposits made upon its own land were upon the only feasible places on which they could be deposited so as to continue the carrying on the business of mining for coal. Evidence offered upon the part of defendant at the trial to prove that its mines were properly located and their operations properly conducted in the ordinary way in common use in mining in that neighborhood, and in the only possible and feasible way in which the defendant could deposit its *débris*, was rejected, upon the objection of the plaintiff. The defendant requested the court to instruct the jury that it was a corporation duly empowered by its charter to mine coal, and that this power to mine coal involved the power to do all things made necessary by the natural conformation of the land and all things included in the reasonable and proper use of mining-lands. The court refused to give the charges requested by the defendant, and in their stead charged the jury as follows: "The first principal question that will demand your attention is, whether or not the defendant intentionally threw and deposited, and permitted to be thrown and deposited, the coal-dirt, slack, and refuse from its coal mines into Sugar Creek, or in the immediate vicinity of such creek, with the purpose and intention of having the same, by operation of rain falling upon it, wash into the said creek. This is averred in the petition and denied in the answer, and before the plaintiff will be entitled to a verdict at your hands, he must satisfy you by preponderance or greater weight of the evidence the truth of such averment. If he shall fail to satisfy you of the truth of this averment, that will be an end of your labors; for in that event your verdict must be for the defendant. For though

the defendant says in its answer that it was guilty of no negligence or carelessness in the operation of its coal mines, and deposited its slack upon the only feasible place for its deposit, etc., and this is denied in the reply, yet the plaintiff can only recover because of the fact of his petition; and the only wrong conduct complained of in the petition is this intentional deposit of slack, etc., into the stream, or in such proximity thereto that it was intended it should wash in said creek; and it is for the consequence of this wrongful conduct upon the part of the defendant that the plaintiff may recover. . . . The question that you have to deal with is as to whether the defendant, during the time complained of in the petition, did the acts therein charged, and whether injuries resulted to the plaintiff's land therefrom. You will observe the defendant must have intentionally, during the time complained of in the petition, March 1, 1883, to April 24, 1886, the date of filing the petition, deposited this slack or refuse from its mines in this creek, or at some place that it would naturally and necessarily be carried into said creek, or it must have intentionally permitted the same to be done. And by permission here is meant, that having the power and control over the operation of said mines, and knowing said slack and refuse was being so deposited, failed and neglected to prevent the same. Where the slack and refuse is not thrown or deposited directly in the creek, but at a place where it is claimed it will be washed into such stream, the defendant's intention must be gathered from the circumstances under which the same was deposited. One is presumed to have intended the natural consequence of his act purposely done; and if this slack or refuse was deposited at such a place by the defendant that it must naturally and necessarily be washed into the creek or stream, the intention that it would be so washed must be presumed. This is a practical question, and the defendant must be held to the exercise of care and caution in the deposit of its slack, to avoid its being washed into the stream; and that is such care and caution that a man of ordinary prudence and intelligence, desirous of preventing such slack being washed into said stream, would exercise in making such deposits; and if it could not be deposited upon said land without its being necessarily washed in the stream, as must be apparent to any man of ordinary intelligence, then it was the duty of the defendant not to cause its deposit upon said land. Upon the other hand, the defendant cannot be held liable for any unusual result,

or one that would not be anticipated by a man exercising ordinary intelligence while depositing the slack upon his own land; and if injury resulted from such deposit to another, it must be held an accident for which the defendant is not responsible; so you will look into this testimony and determine: Did the defendant deposit, or permit to be deposited, the slack and refuse from its coal mines in this stream? or did it deposit such slack and refuse at some place or places, whether upon its own land or elsewhere, from which it was its legal duty to know that such slack and refuse would be washed into the stream? and was such slack and refuse washed from thence into the stream?" Verdict and judgment for plaintiff, from which the defendant prosecuted a writ of error.

F. W. Merrick, L. D. Vickers, and George K. Nash, for the plaintiff in error.

S. H. Bright and R. F. Price, for the defendant in error.

SPEAR, J. The issue in this case is narrowed by the pleadings to a small compass, though the argument has taken a wide range. We think the case may be determined by the application of simple and well-settled rules of law.

By its answer, the company denied that the deposits of slack and refuse were made or permitted with the purpose of having them washed down onto plaintiff's lands, and denied negligence, but did not deny that it made the deposits and permitted them to remain at the places in the petition charged, nor that they were deposited in such manner as that they would be, and were, carried away by the streams. In the view of the trial court, therefore, there was practically but one question for the jury to pass upon in determining the liability of the company, in case damage were proved as the result of the defendant's acts, and plaintiff's own acts did not prevent a recovery, and that was, whether or not, in making and continuing the deposits, the company's managers knew, or ought as reasonable men to have known, that they would be washed down by the streams and thus injure the plaintiff.

It is fundamental, we presume, that an owner of land has the right to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring land-owner, and where the land is located along the margin of a stream, he is, as a riparian owner, entitled, as an incident to his estate, to the natural flow of the water of the stream in its accustomed

channel, undiminished in quantity and unimpaired in quality, except where his estate is servient to one which dominates it, and except as to injury which may be done to it by one in the performance of an act lawful in itself and done in a manner which does not involve malice or negligence: Washburn on Easements and Servitudes, 4th ed., 316; *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 85. This was the position of plaintiff as to his land on Monday Creek, and as to the waters of that stream.

It is not claimed that the plaintiff's land is, in any legal sense, servient to that of the coal company. But, broadly stated, the claim of the company is, that being a corporation authorized to mine coal in the state, and owning the lands upon and in which its mines are situate, and conducting a business which is of great importance to the public as tending to develop the natural resources of the country, it has the right to place its slack and refuse upon the surface of its own land at such points as is necessary for its convenience in the carrying on of its current and future mining operations, and that if it makes such deposits carefully, without malice, but solely with a view to the reasonable and successful mining of its coal, this is no more than is warranted by the common usage of other coal companies and operators of the Hocking Valley and that section of the state, and is but a lawful and proper use of its own lands; and although the slack and refuse so deposited, in the ordinary course of things, may, when placed there, be expected to wash down and finally reach the lands of the plaintiff, to his damage, yet it is *damnum absque injuria*, and there can be no recovery.

Of course the right of the coal company as a land-owner to the natural and full use of its soil is measured by the same rule as that applied to the like right of the plaintiff. But the right it insists upon is something different from the natural and ordinary use of the soil. While not an unusual one, perhaps, with those engaged in the same business in the locality, it is an exceptional rather than a common and ordinary one. It is not incidental to the use of the soil itself, as such; indeed, is destructive of what is the most common use of the soil, viz., for agricultural purposes. Yet it is not necessarily an improper or unlawful use. Whether it is so, or not, depends upon the circumstances. The course of business is to take the coal in a body from the inside of the mines to the surface, there screen it, and dump the slack and refuse on its

own land, but in such places that, owing to the conformation of the ground, it may be carried down the tributaries, and into Monday Creek. If the company may lawfully do this, even though the probable and natural effect, known to the company's managers at the time, is, that the deposits will wash down onto and injure the plaintiff's lands, or pollute the water of Monday Creek, then there can be no recovery, and the judgments below should be reversed.

That the coal company is a corporation can make no difference in the case. Its rights are just as great, and no greater, than those of a private person in the same business. That it is authorized by its charter to mine coal generally in the state cannot enlarge its rights in any particular locality. Even had its charter empowered it to establish a business and carry it on in a particular place, it cannot be presumed that the state has intended to authorize it to carry on the business in a manner destructive of the property rights of others without compensation. While the thing to be done may be lawful in a general way, there are and must be limitations upon the means by which it is to be done. Nor is it of consequence that the operation of the company's mines tends to the development of the natural resources of the country. But few enterprises, the product of which is useful, fail to advance the general good. Along with many evils attending the working of this class of organizations, valuable services have been rendered to the public by them, and many comforts and necessities are afforded the people by them which the capital of single individuals would be inadequate to produce. At the same time, they are not, in the eye of the law, public enterprises, but, on the contrary, are organized and maintained wholly and entirely for private gain; and so soon as gain ceases to follow their operation, just as soon do the operations themselves cease.

Equally immaterial, as we think, is the matter of custom among coal operators in the Hocking Valley and the surrounding mining districts near thereto of depositing slack and refuse on their own lands, when such custom is invoked to justify deposits so placed as to naturally allow them to wash down, to the injury of lands lying below them. The rights of the plaintiff to the uninterrupted use of his land and the unimpaired use of the water of Monday Creek being secured to him by the common law, how is it possible that a custom can deprive him of them? Why should a usage, the

effect of which, if recognized, is to permit one man to take from another his property rights without compensation, be sanctioned? If it be assumed that the custom is a general one, then it is part of the common law itself, and there would be presented an instance of two rules of law, equally binding, and yet wholly inconsistent the one with the other. If it be claimed that the custom is a particular one, then we have the anomaly of a land-owner's common-law right in his land taken from him by a usage of a particular trade, established by strangers, which it is not pretended he has ever been cognizant of, much less assented to. To have affected the plaintiff, the custom must have been shown to be reasonable and certain, known to him, or to have been so general and well established that knowledge would be presumed, peaceably acquiesced in, and not unjust, oppressive, or in conflict with an established rule of public policy. The alleged custom possessed scarcely one of these attributes. Even though it had been common throughout the state, it would not avail. A usage which is not according to law, though universal, cannot be set up to control the law: *Meyer v. Dresser*, 16 Com. B., N. S., 646; *Stoeper v. Whitman*, 6 Binn. 416; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430. Nor could the testimony offered avail the defendant on the question of negligence. Evidence of a particular custom is sometimes admitted to explain a contract, to ascertain the intention of the parties when it has not been fully expressed in the contract, to interpret the otherwise indeterminate intentions and acts of the parties, or to show that the mode in which a contract has been performed is the one customarily followed by others engaged in the same calling or trade. But as a general proposition, one "charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or those placed under like circumstances or owing similar duties. Such an offer is, in effect, to show, as an excuse for defendant's negligence, a custom of others to be equally negligent": *Deering on Negligence*, sec. 9; *Cleveland v. New Jersey Steamboat Co.*, 5 Hun, 523; *Judd v. Fargo*, 107 Mass. 264; *Hinckley v. Barnstable*, 109 Mass. 126; *Miller v. Pendleton*, 8 Gray, 547; *Bailey v. New Haven etc. Co.*, 107 Mass. 496; *Littleton v. Richardson*, 32 N. H. 59; *Sewall's Falls Bridge Co. v. Fisk*, 23 N. H. 171; *Crocker v. Schureman*, 7 Mo. App. 358. That others engaged in like business have

been accustomed to disregard the rights of their neighbors can furnish no justification to the defendant to do so.

The further claim of the company that it had the right to make the deposits in the places complained of, because it was necessary to the successful conduct of its own business to so place them, seems no less wanting in substance. The effect is to measure the rights of the plaintiff in his lands and in the waters of Monday Creek by the convenience or necessity of the company's business. An owner of land in Ohio is not subject to any such narrow and arbitrary rule. If the injury complained of were merely a fanciful wrong, or produced simply personal discomfort, such as any dweller in a town is necessarily subjected to by reason of the operations of trade which may be there carried on, and which are actually necessary, not only for the enjoyment of property, but for the benefit of the inhabitants of the town and the public at large, there might be no real ground of complaint; but where the result of the acts of one on his own land is a direct and material injury to the property and property rights of another, a very different question arises, and in such case the maxim, *Sic utere tuo ut alienum non lædas*, applies. Upon reason, we think the proposition sound, that where no right by prescription exists to carry on a particular business in a particular manner, at a particular place, and the natural and necessary result of the place selected and the manner adopted is to cause material injury to the property rights of another, it is not a sufficient defense to an action for damages to show that the locality where it is carried on is one generally in use by persons in such business, and the manner in which it is carried on is commonly adopted by others in such business, even though it appear that the use made of the land, while not the common and ordinary use of land as such, is not an unnatural nor improper one in and of itself, nor even an unusual one, and the proposition will be found sustained by abundant authority. From the scores of cases we are content to cite *Tipping v. St. Helena Smelting Co.*, 4 Best & S. 608, 615; 11 H. L. Cas. 642; *Bamford v. Turnley*, 3 Best & S. 61. In the latter case defendant was the owner of land on which was clay well adapted to the making of brick. He dug the clay, molded it, and proceeded to burn it on the land, to the damage of the plaintiff. The court held that an action for a nuisance would lie. Attention is specially called to the opinion of Bramwell, B. Attention is also called to Shearman and Redfield on Negligence, secs. 733, 734: "It is a gen-

eral principle that any person who, without authority, diverts the whole or any part of the water of a stream from its natural course, or interferes with its natural current, is responsible, absolutely, and without any question of negligence, to any one who is entitled to have the water flow in its natural state." "Any use of the land near a stream, or of the water of the stream itself, which renders the water unwholesome, offensive, or unfit for the purposes for which it is used, is unlawful; and any riparian owner who is damaged by such unlawful acts has an action for his damages against the author of the wrong."

If this view of the law be correct, it is clear that the question as to the company's liability, in case damages were proved as the result of the defendant's acts, and the plaintiff's own conduct did not prevent a recovery, was, as held by the trial court, merely a question whether or not, in making and continuing the deposits, the company's managers knew, or ought to have known as reasonable men, that the deposits would be washed down by the stream, and might injure the plaintiff. No obstacle was placed by the court to the making of proof by the company touching this point. The offer of proof in regard to negligence did not embrace this idea, however, and was therefore too general to be of service to the jury. Besides this, it embraced propositions as to matters wholly immaterial, as heretofore shown. It was not error, therefore, to exclude the testimony. For like reasons, there was not error in refusing to charge as requested. Some of the propositions embraced correct principles of law in the abstract, but were not, as stated, wholly applicable to the case made, and might have been misleading, inasmuch as they were in the line of the defendant's theory of the case, which, we think, was wrong. Nor was there error in the charge as given. The rule given the jury as to negligence was in strict consonance with the doctrine laid down by this court in *Crawford v. Rambo*, 44 Ohio St. 279. It is there held that "where a riparian owner constructs an embankment upon his own lands, that occasions substantial injury to the lands of a neighbor upon the stream, and which might, at the time, have been anticipated by a man of ordinary prudence and intelligence, he is liable in damages for the injury as occasioned." The rule, we think, applies to the case at bar.

The case of *Ruffner v. Cincinnati etc. R. R. Co.*, 34 Ohio St. 96, is cited as sustaining the company's claim. With due respect, we think it fails to do so. The question was, whether,

where a railroad company, authorized to propel its trains and operate its road by steam-locomotives, an inference of negligence arises from the mere fact that an injury to adjoining property was caused by sparks emitted by such locomotives, which question the court answered in the negative. The railroad company was authorized by the state to construct its railroad and operate it by locomotives, and the only way by which it was possible for the locomotives to be driven was by the creation of steam by means of fire, and sparks would necessarily follow. It was not only the natural and common way, but the only practical way. Negligence must be shown; it will not be presumed. Hence, when the only fact present was, that sparks had been emitted from the smoke-stack which caused damage, the court would not infer that the fire was carelessly conducted, nor that the appliances of the railroad company were defective.

But whether or not, at common law, the action could be maintained, there seems to be no question but that the acts charged against the defendant company, if done intentionally, constituted a nuisance punishable by the criminal statute, and that a right of action on the part of a person injured would follow. By the act of April 15, 1857 (1 Swan and Critchfield's Rev. Stats. 880), "the obstructing or impeding, without legal authority, the passage of any navigable river, harbor, or collection of water, or the corrupting or rendering unwholesome or impure any watercourse, stream, or water, or unlawfully diverting any such watercourse from its natural course or state, to the injury or prejudice of others," was declared a nuisance, made punishable by fine, and a right of action given to any person injured for civil damages. The act of March 27, 1876 (73 Ohio Laws, 87), provided "that if any person or persons shall intentionally throw or deposit, or permit to be thrown or deposited, any coal-dirt, coal-slack, coal-screenings, or coal, or other refuse from coal mines, into or upon any of the rivers, lakes, ponds, streams, or any place adjacent to the same, from which such coal-dirt . . . will wash into any of the rivers, lakes, ponds, or streams of this state, every such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined," etc., "and shall moreover be liable to the party or parties injured in treble the amount of damages by him, her, or them sustained." This act was codified the following year and made part of the penal code (74 Ohio Laws, 264), under the head of "Nuisances," and is section 7 of that

chapter. In this codification, which is now, in substance, section 6925 of the Revised Statutes, the provision for treble damages is omitted. It does not follow, however, that civil damages may not be recovered. The acts charged in this case against the company came within the statutory definition of nuisances. This legislation shows a legislative intent to give the injured party a civil action. But aside from this, it is settled law, we presume, that for injuries arising from a nuisance the injured party may have an action. Judge Cooley, in his work on torts (2d ed., p. 790), says: "It is sufficient to say of the authorities that they recognize the rule as a general one, that when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none." See also cases cited, and *Cardington v. Fredericks*, 46 Ohio St. 442.

If, therefore, the evidence showed that the statute had been intentionally violated, a statutory nuisance was shown to have been committed, and those engaged in producing it would be liable. Let it be assumed that the company, on account of its artificial character, could not be indicted and punished, yet the persons in its employ who did the acts could be held both criminally and civilly, and whenever the acts of an employee are such as to make him liable personally, the employer, whether a natural person or a corporation, may be held civilly, where it is shown that the acts of the employee were performed in the line of his duty. So that, in this case, if the acts done would have rendered the employees amenable to the criminal statute, no rule of law forbids the reaching beyond them and visiting responsibility in civil damages upon the corporation itself. Its liability will be measured by the same rules of law which determine the liability of the employees. Applying this test, we suppose the rule to be well settled, that persons of intelligence are presumed to have intended the natural consequence of their deliberate acts. If, therefore, the natural result of placing slack and refuse in the stream, or on the margin or bank, is, that they will be washed down by heavy rains onto the lands of plaintiff, and this would be apparent to the ordinary observer, it is but just to assume, in the absence of a contrary showing, that the expectation was, that it should so wash. And this state of facts would show that the company exercised its right negligently. But if such washing was not

a natural consequence, and would not have been anticipated, as a natural result, by persons of usual intelligence, in the exercise of ordinary care, no intent would be presumed, nor negligence imputed, and if damage ensued to persons having property on the streams below, by the washing of slack, etc., no liability would attach to those who made the deposits. And, in substance, the foregoing was given by the trial judge to the jury.

The charge upon other questions presented is an accurate statement of the law of the case. An examination of the record fails to show any error therein.

Judgment affirmed.

CORPORATIONS — RIGHTS OF. — A corporation, within its prescribed range, can do whatever a natural person could do in the conduct of its legitimate business: *Killingsworth v. Portland Trust Co.*, 18 Or. 351; 17 Am. St. Rep. 737; *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412, and note. A statute prohibiting a person from doing certain acts is equally applicable to corporations, though they are not referred to therein: *People v. Utica Ins. Co.*, 15 Johns. 353; 8 Am. Dec. 243, and note.

WATERCOURSES — DÉBRIS — INJURY TO LAND. — Where a defendant caused debris to be deposited in a natural stream of water, which was carried down and deposited on the plaintiff's land, he was held liable for the injury caused thereby: *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 40 Am. Rep. 118, and note. General custom will not justify a coal-mining company in pumping water from its mines into a stream of water, thereby fouling it, to the injury of a riparian owner: *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; 39 Am. Rep. 785; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711, and note. Where tan-bark, thrown in a stream by defendant, is deposited on the land of plaintiff, no right by prescription to so deposit his tan-bark arises in favor of defendant, though he may have done so for twenty years: *Orosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271. A manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business: *Lantz v. Carnegie*, 145 Pa. St. 612; 27 Am. St. Rep. 717, and note. See note to *Helfrich v. Catonsville Water Co.*, 28 Am. St. Rep. 249.

USAGE CANNOT CONTROL LAW. — Usage and custom cannot be proved to contravene a rule of law: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771, and note; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255, and note; *Cranwell v. Ship Foodick*, 15 La. Ann. 436; 77 Am. Dec. 190, and note.

KITCHEN v. LOUDENBACK.

[48 OHIO STATE, 177.]

A WAGER IS A CONTRACT in which the parties stipulate that they shall gain or lose on the happening of a certain event in which they have no interest except that arising from the possibility of such gain or loss.

WAGER, WHAT IS NOT. — A contract by which the vendee purchases fifty bushels of seed-wheat at fifteen dollars per bushel, and the vendor agrees to sell at the same price one hundred bushels, to be grown by the vendee from such seed, less a commission of 33½ per cent, and gives a bond to secure the performance of such agreement, is not a wager, though it is not certain that the vendee will raise one hundred bushels of wheat, or if raised, that the vendor will be able to pay the price stipulated.

APPELLATE PRACTICE. — **IN THE ABSENCE OF A BILL OF EXCEPTIONS** setting out the evidence, if any state of evidence consistent with the pleadings will justify the verdict and judgment, the appellate court is bound to presume, in support of the judgment, that such evidence was given.

NEGOTIABLE INSTRUMENTS. — **THE PURCHASER** of a negotiable instrument, before due, in the usual course of trade, for a valuable consideration, is entitled to enforce it, though he took it under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man, unless such circumstances further showed that he acted in bad faith or with a want of honesty.

NEGOTIABLE INSTRUMENTS. — **A BONA FIDE PURCHASER** of a negotiable instrument who pays less than its face value is entitled to recover its face, with interest, though it was procured by fraud, and could not have been enforced by the original payee.

ACTION upon a promissory note for \$420, made by the defendant, Kitchens, in favor of E. S. Clark, and indorsed by the latter to the plaintiff, Loudenback, before maturity. The answer, as amended, alleged that Clark was the superintendent of the North American Farmers' and Planters' Company, a corporation engaged in the business of selling red-line wheat; that the note was given in part payment for fifty bushels of wheat sold by Clark for seed, and which, though sown at a proper time, proved to be worthless and unsound, and a total loss, and further, that the note was given pursuant to a scheme by which the corporation agreed that of the crop which Kitchen should raise from the seed sold him, it would sell for him one hundred bushels at fifteen dollars per bushel, first deducting 33½ per cent for its commission; that such price was a fictitious, speculative, and gambling price, and the transaction therefore illegal; that the corporation, at the time of receiving the note, gave its bond to carry out its agreement, and that the conditions of the bond had not been performed, and their performance was illegal and impossible, and the note void under the statutes of Ohio. To these defenses a demur-

rer was sustained. A second amended answer was filed, averring that the purchase of the note by Loudenback was with knowledge of its illegal consideration, and the facts putting him on notice of the real transaction out of which it had arisen, and he paid only \$367.50 therefor. The defendant requested the court to charge the jury that if the consideration of the note arose out of the transaction set out in the second amended answer, that the plaintiff could not in any event recover more than he paid for the note, with interest on the amount so paid. The court refused to so instruct the jury, but, on the contrary, charged them as follows: "The definition of the terms which I have just used may aid you in determining the questions in the case. Briefly, if the purchaser pays cash for a note, he acquires it in the usual course of trade for valuable consideration. Before maturity is before a note, by its terms, is due and payable. This note, by its terms, became due and payable April 1, 1886; allowing three days of grace, it became due and payable April 4, 1886. Therefore, if you find that the plaintiff paid \$367.50 cash for the note, on July 16, 1885, to a person authorized to sell it, and obtained the note, the note, being payable to bearer, might pass by delivery, but the transfer is not defeated or affected by the indorsement of the payee, Mr. Clark, and the plaintiff would then have acquired it in the usual course of trade for a valuable consideration, and would be entitled to recover thereon, unless it appears from the evidence that he had, at the time, notice of the alleged considerations, already stated and claimed to be in the note, or that he had information which ought to have excited the suspicion of a reasonable man thereto, and having the opportunity, failed and neglected, or refused to inquire thereto, because he was afraid he would thereby learn what he did not want to know. It is not sufficient, if it only appears that he took the note under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man, but it must appear that he took the note under circumstances as show he acted in bad faith or with a want of honesty, and in determining whether he so acted, you will look to all the circumstances and the evidence of the fact, if proved as claimed, that he paid less than its fair and reasonable value for the note. If, under all circumstances, you find the plaintiff acquired and holds the note by purchase in good faith, in the usual course of trade for a valuable consideration, before due, without notice of such infirmities, your verdict will be in his

favor for \$420, with six per cent interest to this date. Add together the sum so found, — that is, the interest and principal, — and the whole sum will be his damages. If you are satisfied that the note was given for seed-wheat at fifteen dollars per bushel, and that such seed proved worthless as such, then your verdict would be in favor of defendant, provided you further find that Mr. Loudenback had notice of the worthless character of the wheat and of such consideration, or had such notice as to put him on inquiry, and he failed to inquire, solely for the reason that he did not want to know the consideration.” Verdict and judgment for the plaintiff for the entire amount of the note, with interest. The defendant prosecuted a writ of error.

Keifer and Keifer, for the plaintiff in error.

George J. Arthur, for the defendant in error.

SPEAR, J. 1. The first exception is to the sustaining of the plaintiff's demurrer to the second defense as set up in the amendment to answer. It is insisted that this defense showed the note to have been based upon a gambling consideration, and therefore void under section 4269 of the Revised Statutes. That section provides that all notes, etc., when the whole or any part of the consideration is for money or other valuable things won or lost, laid, staked or betted, at or upon any game, or upon any wager, etc., shall be absolutely void. No one would doubt that the alleged contract was immoral and against public policy; but does it involve a wager? A wager is defined (*Fareira v. Gabell*, 89 Pa. St. 89) as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss. In this case the company sold and actually delivered to Kitchen fifty bushels of wheat at fifteen dollars per bushel. It further agreed to sell one hundred bushels of wheat, to be grown by Kitchen from this seed, at the same price, less commission of 33½ per cent, and gave its bond to him to secure the performance of this agreement. Had the contract been a lawful one, the failure of the company to perform would have been measured by damages and enforced by action on the bond. And whatever may have been the intention of the company, it is clear that Kitchen had no idea but that the company would perform its agreement, and relied upon the bond as his security. He did not intend to enter into a

gambling contract. In that aspect, therefore, the contract lacked mutuality. It is true that there were elements of uncertainty in the transaction. Kitchen's crop might fail to yield the quantity he expected would be sold, or any quantity, and the company might not be financially able to respond even should he be ready. But it does not follow that every contract which presents uncertainties is a wager. Nor did the company expect or intend to lose in case any failure of crop should make it impossible for the agreement to sell, on its part, to be carried out. Its intent was to obtain Kitchen's note for the fifty bushels of wheat delivered, and that alone. In no view of the case was this a gambling contract within the meaning of the section of the statute quoted.

As against the petition, the answer may have set up a defense, so, at least, as to throw upon Loudenback the burden of proving a purchase of the note before due, in the usual course of trade and for value, and in this aspect it may be that the demurrer should have been overruled. But we think the exception cannot be sustained, because it does not appear that the defendant was prejudiced by the ruling. The answer was subsequently amended by adding an allegation that the plaintiff, at the time he obtained the note, had notice of its want of consideration and fraudulent character. The defendant had, therefore, at the trial, advantage of the allegations of the second defense as originally pleaded, unless the court made some improper and prejudicial ruling as to the introduction of evidence or order of proof. The record fails to show any error of this kind, and it must be presumed, in favor of the judgment, that none such was made. It is settled in Ohio that, in the absence of a bill of exceptions setting out the evidence, if any state of the evidence consistent with the pleadings would justify the verdict and judgment, a reviewing court is bound to presume, in support of the judgment, that such evidence was given: *Ide v. Churchill*, 14 Ohio St. 372; *Bailey v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385. And it may be safely concluded that if the defendant had been in any wise prejudiced by the holding of the trial court upon evidence, the vigilant counsel would have seen to it that the error was fully set forth in the record.

2. It is alleged as error that the court said to the jury: "Briefly, if the purchaser pays cash for a note, he acquires it in the usual course of trade for a valuable consideration." The equivalent of the above is decided in *Tod v. Wick*, 36

Ohio St. 370, in these words: "Where the indorsee of a negotiable promissory note pays cash therefor, he is a purchaser in the usual course of trade, notwithstanding the fact that he paid for the note a sum less than its fair and reasonable value." Irrespective of this, however, the charge upon what constitutes a purchase of a note in good faith for value, in the usual course of trade, is full and accurate, and this court would not incline to disturb the judgment for this cause alone, even if it doubted the accuracy of the sentence quoted above, taken by itself.

3. The court, in the charge, said to the jury that "it is not sufficient if it only appears that he (plaintiff) took the note under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man, but it must appear that he took the note under circumstances as show he acted in bad faith, or with a want of honesty." This is excepted to. We think the exception not well taken. The instruction was given to apply in the event that the jury found the plaintiff purchased the note before due, in the usual course of trade, for a valuable consideration, and there is express authority for the instruction in *Johnson v. Way*, 27 Ohio St. 374, and in a large number of other cases. The proposition may be regarded as settled law in this state; and upon this branch of the case the entire charge is fully as favorable to the defendant below as he could properly ask.

4. It is further urged as error that the court said to the jury, that if entitled to recover at all, the plaintiff was entitled to recover the face of the note, with interest. The theory of this exception is, that the indorsee of paper, the consideration of which is illegal or fraudulent, can recover only the amount he paid, with interest, because he should not be permitted to speculate as against the maker of the note. A long list of cases is given in support of this claim, and a number of them do support it. It seems to be conceded, however, that in the absence of fraud or illegality in the inception of the note, though the consideration has wholly failed, the *bona fide* purchaser for value before due may recover the full face, with interest. We fail to perceive that, upon principle, there is any difference between the two cases. Undoubtedly, such holder's rights must be determined by ascertaining what he gets by his purchase. If the note, then it seems clear that unless the maker may be allowed a defense against the note, the measure of his liability is all that appears due on it. Can

there be doubt that it is the note he purchases? The familiar rule is, that defenses which might be set up as between the original parties to negotiable paper will not avail as against a *bona fide* purchaser for value, in the ordinary course of trade, before maturity. In other words, such purchaser acquires the note clear of all defenses, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited by reason of the illegality of the consideration. That is, the purchaser takes the note itself. He does not take a cause of action for money paid to another's use. In paying, he is not paying money to the use of the maker, or for his benefit. He purchases the maker's promise to pay. He is protected against defenses, because he has the right to put faith in the representation on the face of the paper that it was given for a valuable consideration, and as against the maker, the note is held to be as he represented it. He is therefore estopped from denying such representation. How is the case changed where fraud or illegality enter into the inception of the note? The note is not void in either case. The purchaser does not any the less purchase the note. He is not, in any sense, less the owner of the paper itself. When action is brought to recover, the suit is just as much upon the note itself in the one case as in the other. The representation of the maker has the same effect in inducing a transfer of the paper in the one case as in the other, and it would seem that it ought to be no less conclusive in the one case than in the other. The defense of the maker is against the note, and against the note only, in either case. If he may resist the amount of recovery, it is because he has a defense to the note which he may be permitted to make. Without such defense, the holder could recover the amount appearing due. If the defense is permitted, it does avail against the *bona fide* purchaser. And thus it would result that the *bona fide* purchaser, instead of holding the note clear of equities existing between the original parties, would be subjected to a partial defense. This would seriously impair the usefulness of commercial paper as a medium of exchange. We think the more logical rule, as well as the safer and sounder one, is, that the *bona fide* purchaser, at whatever price, takes the entire obligation of the maker. The amount paid is important as bearing on the *bona fides* of the purchase, but when it has been ascertained, from all the circumstances, that the purchase was made in good faith, before due, in the ordinary course of business, the re-

covery should be the amount of the note and interest. Where the indorsee holds the note only as collateral security for another debt, and there is no innocent party entitled to take the surplus, the doctrine is, that the recovery is limited to the amount of the debt actually due. This rule is founded upon principles obviously reasonable and just. But, in strictness, such holder is not a purchaser. He holds only for the protection of his actual debt. The case before us is not that case.

The argument *ab inconvenienti* affords considerations supporting the conclusion above indicated. Negotiable paper, in the ordinary course of trade, is likely to pass from hand to hand, and to be purchased for different sums. Its value is determined largely by the present responsibility of the maker, the probability of his continued ability to pay, and his character for punctuality in meeting engagements, and hence that value may change from time to time. If the amount paid is to be taken as the measure of recovery, which purchase is to be regarded as the one fixing the amount of recovery,—the last one, or some previous ones? and if the latter, which? It seems to us that the rule contended for by counsel, besides being illogical, and tending to impair the value of commercial paper, would lead to perplexing uncertainties.

A strong case sustaining our conclusion is that of *Cromwell v. County of Sac*, 96 U. S. 51. Bonds authorized by a vote of the people of Sac County to procure the building of a courthouse had been illegally issued and delivered by a county officer to a contractor who wholly failed to build the courthouse, and were purchased by the plaintiff before due, for value, without notice of any infirmity. The court held that “a *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited by reason of the illegality of the consideration,” and “a purchaser of negotiable securities before their maturity, whatever may have been their original infirmity, can, unless he is personally chargeable with fraud in procuring them, recover against the maker the full amount of them, though he may have paid therefor less than their par value.” Mr. Justice Field, in the opinion, after announcing the foregoing, uses this language: “We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is, that

the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted, in their claims upon such securities, to the sum they had paid for them."

Lay v. Wissman, 36 Iowa, 305, is a case directly in point. See also *Tod v. Wick*, 36 Ohio St. 370, and the well-considered opinion of Shauck, J., in the present case, 8 Ohio C. C. Rep. 228.

We find no error in the record, and the judgment will be affirmed.

WAGERS — WHAT ARE. — Dealings in futures are in the nature of wagering contracts: *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363, and note; note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 33; extended note to *Crauford v. Spencer*, 1 Am. St. Rep. 754.

NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASERS. — The possession of a negotiable instrument, acquired in good faith and in the usual course of trade, constitutes the holder a purchaser, whether the person from whom he received it had title or not: *Wilson v. Lenton*, 82 Tex. 531; 27 Am. St. Rep. 908. Fraud is no defense against a *bona fide* indorsee for value, and before maturity: *Bedell v. Herring*, 77 Cal. 572; 11 Am. St. Rep. 307, and extended note discussing *bona fide* purchasers, who are, and their rights. See also *Rubles v. Davis*, 33 Neb. 779; ante, p. 509, and note; note to *Rice v. Jones*, 14 Am. St. Rep. 809.

FRANKLIN v. BAKER.

[48 OHIO STATE, 206.]

ALTERATIONS IN WRITINGS — PRESUMPTIONS CONCERNING. — Any erasure or interlineation found in a note should be presumed to have been made before it was executed.

J. A. Flory and J. W. Owens, for the plaintiff in error.

Charles H. Kibler, for the defendant in error.

MINSHALL, J. The plaintiff, Franklin, brought suit upon a note claimed to have been made by D. M. Baker, deceased, for two thousand one hundred dollars, dated April 5, 1882.

The defendant denied the execution of the note. On the trial, the plaintiff having introduced proof of the genuineness of the maker's signature, offered the note in evidence, which was admitted, over the objection of the defendant. The plaintiff offered no other evidence. At the close of the evidence, the defendant, claiming that the note had, as appeared from its face, been altered, asked the court to charge the jury that if they find from an inspection of the note that there has been suspicious alterations as to the date and amount, or either, and such alterations have not been satisfactorily explained by the plaintiff, he is not entitled to a verdict. This the court refused, and thereupon charged the jury that an alteration would not invalidate the note unless made after its execution, and that for the purpose of a defense the burden was on the defendant to prove that it was so altered.

Whether the note has been changed at any time is not clearly apparent from the face of it. The only claim of the defendant is, that an apparent blurring indicates that the figures 5 and 82 in the date, "April 5, 1882," have been changed from the figures 4 and 79, respectively; and that there are some indications that the amount, "twenty-one hundred," written in the body of the note, has been changed from "ten hundred" or "twelve hundred," and that a corresponding change has been made in figures standing for the amount on the margin of the note. A photographic copy is inserted in the bill of exceptions, and from this it would be difficult to say whether it suggests any change to have been made in the note before or after its execution. But conformable to the charge of the court and the view we take of the case, the note may appear on its face to have been changed at some time after it had been written, without affecting its validity. For if it appears to have been changed, then the question arises whether it was so changed after or before it was executed and delivered. If before, that would not affect its validity. Such changes are frequently made, more frequently now than when men of business had less skill, and employed others to do for them what they do now as a matter of every day's practice for themselves. But if the change was made afterwards, and without the consent of the maker, the alteration constituted a crime, which the law never presumes in the absence of proof. The only presumption the law indulges in such cases is in favor of the honesty and good faith of what appears to have been done. Hence it was the duty of the jury to presume,

until the contrary appeared, that any erasure or interlineation to be found on the note had been made before the note was executed, since that presumption not only consists with the integrity of the party who made it, but is conformable to human experience, at this day, of the connection between such changes to be found in promissory notes and other written instruments, and the time when they were made: *Wilson v. Hayes*, 40 Minn. 531, 536; 12 Am. St. Rep. 754.

We do not see that the defendant's request, the refusal of which is assigned for error, was any more proper than saying to the jury that the burden is on the plaintiff in any case to explain an alteration in the paper sued on, where it is apparent that a change has been made. How can it be determined from a simple "inspection of the note" that an alteration was made after the signature to it? It may satisfactorily show, as in the case of an erasure or interlineation, that it was changed after it had been written, but to assume that such change was made after the note was made and delivered, without any extrinsic proof, is to presume, without evidence, that the change was fraudulently made, when, as a matter of fact, the chances are more than equal that it was made at or before the execution and delivery of the instrument, and to conform it to the intention of the parties.

The cases elsewhere are not uniform on the subject. Some hold that alterations apparent on the paper must be explained by the party producing it, and, in the absence of such explanation, it is presumed to have been made after the execution of the instrument, and so fraudulent. This, it would seem, was the earlier rule at common law as to deeds and similar instruments; but its inconvenience was such as to cause it to be abandoned as early as the time of Lord Coke. And the rule as to such instruments in England, and generally in this country, is, if nothing appears against the alteration, to presume that it was made at the time of making the deed, and not after: *Bailey v. Taylor*, 11 Conn. 531, 534; 29 Am. Dec. 321; *Speake v. United States*, 9 Cranch, 37; *Wickes v. Caulk*, 5 Har. & J. 36; *Hanrick v. Patrick*, 119 U. S. 156, 172; *Little v. Herndon*, 10 Wall. 27, 31. In the latter case, cited with approval by Justice Mathews in the preceding case, Justice Nelson said: "In the absence of any proof on the subject, the presumption is, that the correction was made before the execution of the deed. In a recent case in the queen's bench, Lord Campbell, C. J., in delivering the opinion of the court,

The case of *Huntington v. Finch*, 3 Ohio St. 445, is not in point. There the only question was as to the materiality of the change that had been made in the note, — the erasure of the name of the surety. The facts were not in dispute. The court simply held that the erasure of the name of the surety, at his request and with the permission of the payee, did not affect the rights of the principal, and so did not amount to such an alteration as would invalidate the note. The observations of the court may, conformable to a view taken by many courts at that day, indicate an opinion that the burden of explaining what are termed alterations of a suspicious character is on the plaintiff. But no such question was before the court, and its remarks should be confined to the case it had under consideration.

The character of an alteration may be such as, in connection with other circumstances, would persuade the mind that it had been fraudulently made after the execution of the instrument. But no such inference should be drawn from an alteration standing alone, however apparent upon the face of the paper. There is no sounder principle applied by the law to the affairs of men than that which assumes what appears to have been done was done with a proper motive and conformable to its requirements, until the contrary appears; and the reason is, that the assumed fact is generally found to conform to the truth. It is true that we are without any definite statistics, but, the low estimate of our race entertained by the pessimist aside, we may safely trust our own observation and experience for the assertion that ninety and nine alterations to be found on the face of written instruments were lawfully and properly made, for every one that had its origin in a fraudulent purpose. The law, in its wisdom, trusts much to the general honesty of men; indeed, if human depravity were such that it could not, — if honest men were the exception and rogues the rule, — civil government would be impossible. Therefore, the question as to when an alteration was made in a written instrument is one of fact to be determined from a consideration of all the circumstances; and where it is claimed to have been made for a fraudulent purpose, the burden of establishing the fact must, according to the reason and analogies of the law, be upon the party who asserts it.

It is argued that this is unfair to the representatives of a deceased maker of a note, whose mouth is closed by death, but we fail to perceive that the opposite rule would be any

less so to the other party, whose mouth, as a witness, is also closed in such case.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

ALTERATION OF INSTRUMENTS — PRESUMPTIONS CONCERNING. — If a writing appears to have been altered, but there is nothing to show when or by whom such alteration was made, the party claiming that it was made after delivery and without authority must assume the burden of proof: *Hgan v. Merchants' and Bankers' Ins. Co.*, 81 Iowa, 321; 25 Am. St. Rep. 493, and note; *Wilson v. Hayes*, 40 Minn. 531; 12 Am. St. Rep. 754, and note; *Gandy v. Dewey*, 28 Neb. 175.

PENNSYLVANIA COMPANY v. LANGENDORF.

[48 OHIO STATE, 316.]

NEGLIGENCE, CONTRIBUTORY. — TO PASS IN FRONT OF A RAPIDLY MOVING TRAIN TO SAVE THE LIFE of a child of tender years is not negligence *per se*, though the person thus risking his life is under no legal obligation to rescue the child, and might, had he chosen to do so, have stood by and permitted it to be killed without violating any rule of law, civil or criminal. In the presence of the impending peril to the child, and the necessity for instantaneous action if its life were to be saved, it would be unreasonable to require deliberate judgment from one in a position to afford relief.

NEGLIGENCE. — ONE WHO ATTEMPTS TO RESCUE A PERSON PLACED IN A POSITION OF IMMEDIATE AND DEADLY PERIL through the negligence of a railway company, and who is himself injured in such attempt, may recover of such corporation for the injury so suffered, if, when considered in connection with the emergency under which he was called to act, and the confusion attending it, the jury is of the opinion that his conduct was not negligent.

ACTION brought by Langendorf to recover for injuries sustained while attempting to rescue a child who had fallen in front of a train of cars owned and operated by the Pennsylvania Railway Company. Judgment in favor of the plaintiff, from which the defendant prosecuted a writ of error.

E. W. Tolerton, for the plaintiff in error.

Bissell and Gorrill, for the defendant in error.

BRADBURY, J. The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the

other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about seven o'clock in the evening, or a little later, but while it was yet light; the watchman had finished his day's labor, and gone away, and the gate was raised (or open), though the street was perhaps as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city.

The defendant in error and the nurse were engaged in conversation, at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and seeing or hearing the approaching train, became excited by the sight or noise, or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and probably that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call, it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised and the watchman absent was not disputed at the trial, so far as the record discloses, and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the railroad company was established.

It is contended, however, that the negligence of the railroad company should have related to the party injured, and that the jury, in passing upon the case of the defendant in error, should not have taken into consideration the rights of the rescued child, but should have confined itself to considering the relations existing between him and the railroad company. And in this connection the plaintiff in error requested the court of common pleas to charge the jury as follows: "The

plaintiff's right to recover depends entirely upon the fact that the defendant was guilty of negligence in its relations to this plaintiff. The jury, in deliberating upon your verdict, must not consider the rights of the child. This action has nothing to do with her rights. The sole questions here are, Was the defendant guilty of negligence which caused the plaintiff's injuries? and was the plaintiff himself guilty of contributory negligence?"

This request was properly refused. Negligence does not usually relate to any one in particular, and does not in any case so relate, unless there is some special duty owing to the individual affected by the negligent act or omission. In the case under review, the railroad company owed no special duty to either the rescuer or the rescued that it would not have owed to any individuals similarly situated; the obligation was to the public generally, and any person who, without fault on his part, received an injury in consequence of its failure to discharge this obligation, may recover from it compensation therefor. No other relation is necessary, where the obligation is to the public, than that the one, by its negligence, has caused injury to the other without the latter's fault.

It is also objectionable in another particular, — that of requiring the jury to ignore the rights of the child. It is true that the child, in its relations to the railroad company, might have a right of action for injuries received by it, and yet no right accrue to the defendant in error for those received by him in the same accident. The circumstance that the child had a right of action could not be conclusive that the defendant in error had one also, though the same blow of the locomotive injured both, for the negligence of the latter might contribute to the result in a manner to defeat his recovery, while no negligence could be imputed to the child. If it was the object of this request to impress upon the minds of the jury the proposition above stated, that the rights of action of the child and its rescuer against the railroad company were distinct, the language selected was not well chosen. The phrase, "The jury, in deliberating on your verdict, must not consider the rights of the child. This action has nothing to do with her rights," — was well adapted to mislead the jury into the belief that the imminent danger of the child, and its right to be rescued therefrom, were to be excluded from their consideration. This view would have defeated the recovery, for the very ground upon which the defendant in error founded his

claim was, that the imminent peril of the child warranted the risk he assumed in undertaking its rescue.

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger.

The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury, it must be shown, — 1. That the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the railroad company; and 2. That in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which will be your duty to determine from the evidence. . . . If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons. . . . If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort."

Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury to say whether the act of the defendant in error, under all the circumstances and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right

of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent, and that however commendable his conduct may have been when viewed from the standing point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child; if he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal; therefore, what he did in the matter was a voluntary act, in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another, it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some states, when the act is in some respects not strictly lawful.

The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances, it would be unreasonable to require a deliberate judgment from one in a position to afford relief; to require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be, in effect, to deny the right of rescue altogether, if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion, usually present on such occasions, the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances,

springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.

In *Evansville etc. R. R. Co. v. Hiatt*, 17 Ind. 102, language is used by the judge in deciding the case which, to some extent, supports the doctrine; but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In *Eckert v. Long Island R. R. Co.*, 48 N. Y. 502, 3 Am. Rep. 721, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness, in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator, for damages resulting from his death, was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri: *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692; *Donahoe v. Wabash, St. L., & P. R'y Co.*, 83 Mo. 560; 53 Am. Rep. 594; Beach on Contributory Negligence, sec. 15, p. 45; Wharton on Negligence, sec. 814; Pierce on Railroads, 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts: *Carroll v. Minnesota Valley R. R. Co.*, 14 Minn. 57; *Pennsylvania Co. v. Roney*, 89 Ind. 453; 46 Am. Rep. 173; *Cottrill v. Chicago, M., & St. P. R'y Co.*, 47 Wis. 634; 32 Am. Rep. 796. We think the court of common pleas did not err in leaving it to the jury to determine, from all the circumstances surrounding the defendant in error at the time he sprang to the rescue, whether the act was rash or not, and in saying to them that if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down, in advance, a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him

to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment affirmed.

NEGLIGENCE — CONTRIBUTORY — RESCUING ANOTHER. — Emergencies may sometimes be given in evidence, and will justify what would otherwise be an indefensible act; such, for instance, as that of an engineer standing at his post in the endeavor to save the lives of his passengers where a collision is imminent, or of a person rushing in front of an engine to save the life of a child, or placing himself in a position of danger to save the life of another: *Harris v. Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and extended note on the subject of contributory negligence; *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons: *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502; 3 Am. Rep. 721. A mother is not guilty of negligence when she attempts to rescue her child from an approaching train, though she may have negligently allowed it to go upon the track: *Donahoe v. Wabash etc. R'y Co.*, 83 Mo. 560; 53 Am. Rep. 594.

CINCINNATI INCLINED PLANE RAILWAY COMPANY v. TELEGRAPH ASSOCIATION.

[48 OHIO STATE, 390.]

MUNICIPAL CORPORATIONS — STREETS, RIGHTS OF TELEPHONE CORPORATIONS THEREIN. — A statutory grant to a corporation of a right to construct telephone lines along and upon a public highway confers the privilege subject to the duty on the part of the corporation of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets.

MUNICIPAL CORPORATIONS — STREETS, EXCLUSIVE RIGHT TO USE. — A municipal corporation cannot, without clear legislative authority, grant the exclusive right to the use of streets for certain purposes to an individual or corporation.

MUNICIPAL CORPORATIONS — CONFLICTING RIGHTS OF TELEPHONE AND ELECTRIC RAILWAY CORPORATIONS THEREIN. — If a telephone company is by a municipal corporation granted the right to erect poles and wires upon the public streets, and to carry on the business of a telephone corporation, and the board of public works of the municipality has power to consent to the use by street-railway corporations of any motive power, then the grant to the telephone corporation is received subject to the right of the board of public works to exercise the powers thus vested in it, and if the board subsequently grants to a street-railway corporation the right to use the single-trolley system of electric railways upon the

public streets, the telephone corporation cannot enjoin such use because the ground circuit of such trolley system necessarily interrupts the telephone business, and thereby impairs the value of the franchise granted to the telegraph corporation.

ACTION by the City and Suburban Telegraph Association against the Cincinnati Inclined Plane Railway Company. Complainant was an Ohio corporation, incorporated for the purpose of constructing, maintaining, and operating telegraph lines, and also authorized to construct and maintain telephone lines and carry on a telephone business. At the time complainant was granted the right to carry on the telephone business in the city of Cincinnati, there was no street-railway authorized by law to use electric power, but the board of public works of the city had authority to grant such right, and did grant to the defendant, after the plaintiff had received its franchise, the right to control and operate an electric system known as the "Sprague Single Trolley Overhead System." Complainant alleged that the right to use this system, with the right to use the earth for a return circuit, necessarily affected and injured the complainant, and made it impossible for it to continue the operation of its telephone system. The trial court accepted complainant's theory, and held that it was the duty of the defendant "to adopt some mode of propelling its cars other than the one which inflicted the said injury upon the plaintiff." The defendant prosecuted a writ of error.

John S. Wise, R. A. Harrison, and E. A. Ferguson, for the plaintiff in error.

Peck and Shaffer, Aaron F. Perry, and Selwyn N. Owen, for the defendant in error.

DICKMAN, J. The Cincinnati Inclined Plane Railway Company was incorporated in the year 1871, under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio." On March 30, 1877, the legislature passed an act authorizing any inclined-plane railway or railroad company theretofore or thereafter organized under the act of 1852 to hold, lease, or purchase, and maintain and operate, such portion of any street-railroad leading to or connected with the inclined plane as might be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it held, maintained, and operated its inclined plane; "provided, that no other motive power than animals shall be used on the public

highways occupied by such street-railway company without the consent of the board of public works in any city having such board, and the common council, or the public authority or company having charge or owning any other highway in which such street-railroad may be laid."

In September, 1885, the Cincinnati board of public works adopted a resolution, consenting "to the use either of electricity, cable, or compressed air as a motive power by the Cincinnati Inclined Plane Railway Company upon the highways in which the street-railroads connected with its inclined plane, and held and operated by it, are laid." In October, 1888, the railway company, setting forth the resolution giving such consent, and stating that it had decided to use electricity as a motive power on its road, made application to the board of public affairs — the legally constituted successor of the board of public works — for permission to erect along the entire length of its road the poles, wires, and other appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoölogical Garden as an electric road. And thereupon the board of public affairs, acting under authority of the act of March 30, 1877, and in furtherance of the grant made by the board of public works, granted the application of the railway company, upon the following condition: "1. The poles to be made of iron of the size and pattern, and the wires to be strung in the manner, as shown on the plan submitted to this board, and hereby approved."

In February, 1889, in accordance with the provisions of section 3306 of the Revised Statutes, the stockholders of the railway company extended the northern terminus of its road at the Zoölogical Garden to the village of Glendale. And in March, 1889, the board of county commissioners of Hamilton County, by resolution, granted the application of the railway company to use and occupy the Carthage turnpike to its northern terminus, by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, so as to enable the company to permit continuous, rapid, and safe transportation between Fountain Square, in Cincinnati, and the village of Carthage. A provision in the grant provided for the removal by the county commissioners of any and all telegraph and telephone poles which might interfere with the operation of the electric road. This provision, however, was afterwards modified by the action of the com-

missioners, so as to locate the telegraph and telephone poles at the curb line.

The plan submitted to and approved by the board of public affairs is known as the "Sprague Single Trolley Overhead System." Under the supervision of the engineer of the board, the poles were erected and wires strung; and about the beginning of June, 1889, the railway company had put its street-railway in operation under that system as far as the Zoölogical Garden, and at the commencement of the original action was engaged in constructing its extension along the Carthage pike, under the grant of the county commissioners, with the necessary appendages and appurtenances of the single-trolley system.

In the Sprague system, the electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley-wire, and a single arm, or pole, attached to the car, and carrying a contact-wheel which runs along and presses up underneath the trolley-wire. The current passes down the pole, or arm, to the switch apparatus on board the car, through the motors, thence to the wheels, and to the tracks. It then passes back to the station along the iron rails of the track, interlaced together by conducting wires, and finally connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current. Some portions of such current, however, are unavoidably diverted through whatever conductors are in proximity, and which themselves have grounded circuits, but generally returning to the source in which it originated by means of the metallic ground connection of the rails as extended by the wire to the dynamo.

The single-trolley system is in use on nine tenths of the railroads in the United States using electricity. As compared with the double-trolley method, it is deemed more simple, less liable to disarrangement, much cheaper, and not liable to accidents which would blockade the cars. It has proved successful, and its general adoption, with full knowledge of the double-trolley method, furnishes strong proof that it is the most approved system. And in the finding of facts by the court at general term, there is nothing in disparagement of the single-trolley system in itself, but it is held objectionable because it includes the grounded circuit, which the defendant in error has adopted, and claims a monopoly of its use, as against the railway company, as an essential part of its telephonic system.

It is evident, therefore, that the railway company derived from the legislature the right to use on its road other motive power than animals; that it acquired the franchise of using electro-motive power; and eliminating from view the telegraph association, it is making lawful use of such franchise in a manner authorized by the statute.

The City and Suburban Telegraph Association was incorporated July 1, 1873, as a telegraph company, with lines extending from Cincinnati to Hamilton, in Butler County, under laws since embodied in the chapter of the Revised Statutes regulating "magnetic telegraph companies," and containing section 3454, which provides: "A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

In 1878, the telegraph association became the licensee of the American Bell Telephone Company, with the exclusive right to use all its patents in Cincinnati and certain territory adjacent thereto, and, although organized as a telegraph company, entered upon the business of a telephone company. After obtaining the license to use the telephone, the telegraph association erected poles and wires upon the streets wherein the railway of the plaintiff in error is situated, and which was then being operated as a horse-railway. These poles and wires were mainly erected in the years 1881 and 1882. But prior thereto, in 1880, the following section was added to the telegraph law: "Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies." But without this section making the provisions of the chapter relating to telegraph companies expressly applicable to telephone companies, we think that the term "telegraph," as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone.

It is thus apparent, that while the telegraph association was organized after the incorporation of the railway company, it had planted its poles, and strung its wires, and entered upon the business of a telephone company before the railway company had put its street-railway into operation with electricity

as the motive power; that permission, in due form of law, was granted to the telegraph association to place and maintain its poles and wires for the purpose of supplying telephonic communication to its subscribers in Cincinnati and vicinity, and also as a means of communication for its longer lines.

But it is urged that the franchise of the telegraph association to construct lines of telephone is greatly impaired by reason of the single-trolley railway using a grounded circuit, whereby a large part of the electric current flows off from the rails to the surrounding earth, and to and upon all telephone wires which may be connected with the earth in proximity to the railway. The action is described as conduction, causing more or less of electric current to be poured into the earth and into all electric conductors connected with the earth, thereby reaching telephone-wires in a grounded circuit, and creating loud and continuous noises upon the wires, which disturb telephonic communication. This disturbance, however, results, not solely from the earth circuit of the railway company, but also from the fact that the defendant in error likewise relies upon the earth for its return circuit, by connecting with the earth the end of its wire farthest from its electric batteries. The telephone wires are carried from the phones of subscribers to the gas-pipes in the rooms where the phones are located, or to water-pipes, or to the earth, in order to make a complete circuit. The interference, moreover, with the operation of the telephone is said to be largely attributable to the delicate mechanism of the telephone wires and phones. The wires, being designed to carry the extremely small current needed for telephone transmission, are too small in size to carry successfully the strong current passing into them from electric railways.

It is claimed that in addition to this conduction or leakage disturbance, the single-trolley electric railway introduces serious disturbances on telephone lines by induction, for the reason that such electric railways employ large wires to convey the current used for the propulsion of their cars, and this current is constantly and rapidly changing its strength; that these rapidly changing currents in the electric railway wires induce disturbing currents in parallel telephone-wires near which the electric railways have been built, and thus prevent a successful transmission of telephonic messages.

These interferences with the telephone service may be obviated, it is stated, by the railway company giving up the single-

trolley system with the ground circuit, and substituting the double-trolley system with its two trolley-wires, two trolley-wheels, and electric current passing from one wire through one trolley, through the motor, back through the other trolley to the other wire, and so back to the generator without escaping to the earth. The grounded circuit, it is insisted, should be abandoned and surrendered to the sole use and service of the defendant in error. But it is admitted that other remedies of the telephone disturbances may be easily obtained by constructing the telephone with a complete metallic circuit, or by resort to what is known as the McCluer device, consisting of a single return wire, to which a number of telephone wires are attached.

Conceding that the mode adopted by the railway company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the inquiry is suggested, whether the railway company must yield up a useful franchise that the same may be exclusively enjoyed by the telegraph association, or whether the association shall adapt its system to existing conditions; whether the company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the association shall use either a complete metallic circuit, or resort to the McCluer device. It is immaterial on which party the expense of the change may fall the more heavily: it is a question of legal right; and as remarked by Lord Hatherly, L. C., in *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 153: "The simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide; leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no other mode of escape, to cease to do the acts which occasion the wrong."

When the telegraph association erected its poles and lines in 1881 and 1882, with the design of conducting the business of a telephone company, it found the railway company operating its street-railway with authority under the statute to use other motive power than animals, to wit, electricity, cable, or compressed air, upon obtaining the consent of the board of

public works. The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the telegraph association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong, from side to side and end to end, to the public, that the public may enjoy the right of traveling and transporting their goods over them. The telephone poles and wires and other appliances are not among the original and primary objects for which streets are opened, for they may be placed elsewhere than on the highways, and yet accomplish their purpose. In *Taggart v. Newport Street R'y Co.*, 16 R. L. 668, it was said by Durfee, C. J., that telephone poles and wires are not used to facilitate the use of the streets for travel and transportation; "whereas, the poles and wires of the railway company are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street-cars are propelled." As a general rule, an occupation of the streets, otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for if not so, the primary object of their dedication or appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel does not confer a prior and paramount right to occupy them, to the exclusion of their use for travel, in a mode different from what obtained when such permission was given.

The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. To those improved agencies, devised for the convenience and advantage of the community in general, the franchise of the telephone company to occupy the streets for carrying on its business must be secondary and subordinate. "The use of a highway for the purposes of a street-railroad involves the application of new appliances and modes of travel, rather than of any new principle. In both a corporation is employed and invested with rights in the highway; in both an expenditure of money is required to put the road in a condition for use and to keep it in repair; but in both the great leading object and public benefit is the accommodation of travelers who may have occasion to use them at fixed tolls or rates

of fare, and not the profit of the proprietors": Ranney, J., in *Cincinnati etc. Street R'y Co. v. Cumminsville*, 14 Ohio St. 523, 545.

In the case of *Hudson River Tel. Co. v. Watervliet Turnpike and R. R. Co.*, 121 N. Y. 397, the right of the telephone company to enjoin the railroad company from operating its road by electricity under the single-trolley system incidentally came under consideration. In delivering the opinion of the court, Andrews, J., after stating that the use of a grounded circuit is not necessary to a telephone system, and that the substitution of the metallic for the earth circuit, besides obviating the disturbance caused by the defendant's road, would promote the general efficiency of the telephone service, says: "The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the state. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity, wherever the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation." In the last-entitled case, the telephone company erected poles for its wires and perfected its system of telephone communication several years before the railroad company substituted electricity in place of horse-power for the movement of its cars.

The authority given by statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that "the same shall not incommode the public in the use of such road," would plainly indicate an intention on the part of the legislature that the company shall exercise such franchise with reference to the comfort and convenience of the traveling public, and shall not, in any manner, abridge or impair the use, by the public, of the most approved methods of travel and transportation. And a reasonable interpretation of the statute would lead to the conclusion, that to impair the public enjoyment of an approved method of conveyance on the streets would be in derogation of the statutory prohibition that the

public shall not be incommoded in the use of the roads or highways.

The statutory permission to the telegraph association to construct its telephone lines along and upon the highways was not, therefore, without qualification. But whether the legislature had or had not imposed the condition that the public should not be incommoded, the association, in our judgment, acquired its privilege or permissive grant subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go on the streets shall have the most convenient and expeditious passage and carriage of person and goods has not been made dependent upon the manner in which the defendant in error has preferred to locate its poles, stretch its telephone wires, or form the electric circuit.

It is in recognition and maintenance of the superior easement of the public in the streets that city councils are required to "cause the same to be kept open and in repair, and free from nuisance"; that the streets are graded and paved, and proper regulations of police provided to govern the actions of persons using them; that the abutting owner, though having a peculiar interest and easement in the adjacent street, appendant to his lot, has no right to place permanent obstructions in the street, or do any act on his own land, outside the limits of the street, that will make the way inconvenient or hazardous, or less secure than it was left by the municipal authorities: *Crawford v. Delaware*, 7 Ohio St. 459; *Elliott on Roads*, 311; *Mallory v. Griffey*, 85 Pa. St. 275; *Milburn v. Fowler*, 27 Hun, 568; *Dillon on Municipal Corporations*, sec. 1032, and cases there cited.

In *King v. Russell*, 6 East, 427, the right of the owner to load and unload his wagons in the highway before his warehouse was held to be entirely subordinate to the right of public passage, and must not be exercised in such a manner as unreasonably to abridge or incommode the latter right. The court say: "The primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance. If the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he

must either enlarge his premises or remove his business to some more convenient spot." As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets should, we think, stand on no higher vantage-ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which may result, advantageously or otherwise, from any public and authorized use of the streets, in any mode promotive of and consistent with the purposes of establishing them as common highways.

This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone when admitted on the highway, without the clearest expression of the legislative will. In *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255, it was held that when the legislature has power to require one public easement to yield to another more important,—*a fortiori* where the other is inferior,—the intention to grant such power must appear by express words or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. We fail to discover any authority, either express or implied, to subordinate the public easement in the streets to the privileges exercised thereon by the telegraph association, under the general terms of the statute permitting the erection of posts, piers, and abutments necessary for its telephone wires, and especially when coupled with the condition that the same shall not incommode the public in the use of the highway.

The demand made by the telegraph association is, not that the railway company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the telegraph association began its operation under the tele-

phone system, neither the statute authorizing it to erect and maintain poles, wires, and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave an exclusive right either to use the earth for a return circuit or a complete metallic circuit formed by double wires. The legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the legislature to give the telegraph association the exclusive right to make use of its streets so as to create a monopoly. In *State v. Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right to the use of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution of the powers which are expressly granted, as make its existence free from doubt.

In the year 1838, Professor Steinheil made the important discovery of the practicability of using the earth as one half, or the returning section, of an electric circuit. Professor Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of a truth in physics, of a law in the operation of the forces of nature, and was not bounded by the trammels of the patent law. For forty years before the telephone was discovered, the use of the earth as a conducting medium in the formation of an electric circuit had been the common property of any electric enterprise. By what grant or title, then, did it become the especial, peculiar, and exclusive franchise of the telegraph association? As it did not originate in legislative or municipal grant, so such exclusive franchise did not spring from priority in its exercise. Where a right is common and universal, and capable of being exercised by all at the same time, there is no applicability of the rule that he who in its enjoyment is prior in point of time is prior in right. He who is first in the field does not thereby gain a monopoly of use.

It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the railway company had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the legislature of the state could

take away from it or injure this franchise, on the faith of which it has expended its capital and labor. Special privileges or immunities are under the control of the legislature. If granted, they may be altered, revoked, or repealed by the general assembly: Const., art. 1, sec. 2. And while corporations with valuable franchises may be formed under general laws, all such laws may, from time to time, be altered or repealed: Const., art. 13, sec. 2. In view of these constitutional provisions, it is clearly within the power of the general assembly to authorize one class of corporations to use in the streets electricity with the grounded circuit as a motive power, and another class to employ the same or a similar agency for the transmission of telegraphic or telephonic messages. And if the proper exercise of the rights granted to the one class under general law is irreconcilable and plainly interferes with a prior grant to a corporation of the other class, it may be construed as the intention of the legislature to deny an exclusive franchise, if not to repeal the antecedent grant.

In considering the advantages conferred upon them by the grant of their corporate rights, it is evident that the primary object or design of the state in granting the franchises of telegraph and telephone companies is, in a large measure, to subserve the public benefit and convenience, and not the mere pecuniary advantage of the owners of the corporate property. The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways, — “the profit to the proprietors being a mere mode of compensating them for their outlay of capital in providing and keeping up the public easement”: Shaw, C. J., in *Commonwealth v. Temple*, 14 Gray, 69, 77. It is in contemplation of such companies being thus subservient to the promotion of the public convenience and welfare that the legislature has granted to them the privilege, among others, of exercising the power of eminent domain, by entering upon any land and appropriating so much thereof as may be deemed necessary for the erection and maintenance of poles, piers, abutments, wires, and other necessary fixtures.

Having received their corporate franchises from the state, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises in the future as the public good may require. A franchise, if granted by the state with a reservation of a right of repeal,

must be regarded as a mere privilege while it is suffered to continue, and the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them solely upon the faith of the sovereign grantor: *Pratt v. Brown*, 3 Wis. 608; Cooley's Constitutional Limitations, 6th ed., 472. But in the absence of such a reservation, its force and effect may be attained through the constitutional power vested in the general assembly to alter or repeal, from time to time, all general laws under which corporations are formed, and to alter, revoke, or repeal all special privileges or immunities that may have been granted.

In illustration of what we have said, is the case of *Lake Shore etc. R'y Co. v. Cincinnati etc. R'y Co.*, 30 Ohio St. 604. In that case, the Lake Shore and Michigan Southern Railway Company instituted proceedings to appropriate, for the construction of its railroad, the right and privilege of crossing with its track and way the track and way of the Cincinnati, Sandusky, and Cleveland Railroad Company. It was the decision of the court, as set forth in the *syllabus*, that every railroad corporation in this state accepts its charter and franchises, and owns and uses its tracks, subject to the power of the state to authorize the construction of other railroads across its tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. Under the constitution and laws of this state, the right of one railroad corporation to cross the track of another, in constructing and operating its road, is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use against the right of the public to a crossing. The court further held that the railroad company across whose track a right of way was condemned could not recover for an injury to its franchise as a railroad, and that detention of trains, loss of future business, or additional expenses incident to the future exercise of its corporate powers could not be taken into the account in estimating consequential damages.

It is contended, however, in behalf of the defendant in error, that conceding the railway company and the telegraph association to be upon an equal footing on the streets and highways in the enjoyment of their respective franchises, the company is bound to conform to the rule, *Sic utere tuo ut*

alienum non lædas. In the view which we take of the relation to each other of the parties to the action, we deem it unnecessary to inquire whether there has been a want of conformity, and to what extent, if any, on the part of the railway company, to the requirements of the legal maxim. Nor do we think it necessary to inquire how far the company making a lawful and careful use of its own property, or of a franchise granted to it by the proper municipal authorities, may be held liable for damages incidentally caused to the association.

From the undisputed facts in the case, as disclosed in the record and printed arguments of counsel, it is evident, as we have already seen, that the railway company acquired from the state and from the city of Cincinnati authority to erect and maintain poles and wires in the streets or highways, and to use electricity as a motive power for its cars. Clothed with such authority, we have, upon weighing the allegations in the original petition, and applying to them the well-settled principles governing the legal rights of the public in the highways, reached the conclusion that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the telegraph association by the plaintiff in error, and that the telegraph association is not entitled to the relief prayed for in its petition. The judgment, therefore, of the superior court at general and special term must be reversed, and the original petition dismissed.

TELEGRAPH AND TELEPHONE COMPANIES — RIGHTS OF, IN STREETS. — A grant of a right to use public streets to maintain and operate telegraph lines is subject to legislative control. Such grant does not abdicate its power over such streets, nor in any way curtail its police power to be exercised for the general public welfare, and if the poles and wires become a serious obstruction and nuisance, it may cause them to be removed: *American etc. Tel. Co. v. Hess*, 125 N. Y. 641; 21 Am. St. Rep. 764, and note; note to *Julia Building Ass'n v. Bell Tel. Co.*, 57 Am. Rep. 409.

TELEPHONE AND ELECTRICAL CORPORATIONS — CONFLICTING RIGHTS OF, IN USE OF STREETS. — A decree of the district court restraining a telephone company from placing its wires near the wires of an electric-light company will be reversed, where it is not shown that the erection of the telephone wire will impair the usefulness of the electric-light wire: *Nebraska Tel. Co. v. York Gas Co.*, 27 Neb. 285. See *Hudson River Tel. Co. v. Watervliet Turnpike etc. Co.*, 121 N. Y. 307, where the questions presented by the leading case are discussed.

BLACKWELL v. INSURANCE COMPANY.

[48 OHIO STATE, 583.]

INSURANCE. — **CONDITION IN A POLICY OF INSURANCE AGAINST THE SALE OR TRANSFER** of the property insured is not broken by the sale of part of the interest of the assured therein, as where he takes a partner, and the property insured becomes vested in the partnership. After such sale the partner insured may maintain an action on the policy in his own name, but can recover only to the extent he has been damaged.

Joseph W. O'Hara, for the plaintiff in error.

Ramsey, Maxwell, and Ramsey, for the defendant in error.

BRADBURY, J. The record in this case raises two questions, both of which must be determined in favor of the plaintiff in error, to entitle him to relief.

1. Did the act of the assured, who before was a sole trader, in receiving a partner, constitute a sale and transfer of the insured property within the meaning of the policy, and the policy thereby rendered void?

2. If it was not such a sale as to render the policy void, may the plaintiff maintain an action on the policy in his own name to recover for the loss?

There is some conflict among the authorities upon the first question. It is discussed by May, in his work on insurance, and by the courts of a number of the states, notably in *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Finley v. Lycoming County Mutual Ins. Co.*, 30 Pa. St. 311; 72 Am. Dec. 705; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; 85 Am. Dec. 452; *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279; *Drennen v. London Assurance Corp.*, 20 Fed. Rep. 657; *Malley v. Atlantic etc. Ins. Co.*, 51 Conn. 222; *Scanlon v. Union Fire Ins. Co.*, 4 Biss. 511; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551; 20 Am. Rep. 583; *Hathaway v. State Ins. Co.*, 64 Iowa, 229; 52 Am. Rep. 488; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714; *Wood v. Rutland etc. Ins. Co.*, 31 Vt. 552.

An examination of the cases above cited will disclose that the conditions in the policies, where forfeiture for alienation was sustained, were materially different from the one involved in this action, except perhaps in the cases in 30 Pa. St. 311, 72 Am. Dec. 705, and that in 16 Wis. 523, 84 Am. Dec. 714, where the language of the condition was very similar to that now under consideration. In the other cases sustaining the forfeiture, the condition contained a provision forfeiting the policy, not

merely for a "sale or transfer" of the property, but in case of "a change of title" or the sale of "any undivided interest therein": 23 Ind. 179; 85 Am. Dec. 452; in case of a "change of title": 10 Mich. 279; "or any change took place in the title or possession": 51 Conn. 222; 20 Fed. Rep. 657; and therefore they cannot be rightfully claimed as direct authorities for the insurance company in the case at bar. In the case in 40 Iowa, 551, the condition against alienation was very similar to those above quoted, but the supreme court of Iowa held "that nothing less than a sale of the entire interest of the party insured would defeat the policy." This doctrine was maintained by Drummond, J., in 4 Biss. 411.

Heretofore this precise question has not been before this court, and in the conflict of authorities respecting it, we feel at liberty to adopt that rule upon the subject which most nearly accords with the policy of our decisions and the presumed intention of the parties. It is the policy of this court to strictly construe those clauses in an insurance policy which forfeit the indemnity provided for the assured: *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; 22 Am. Rep. 294. In this case, on page 10, Johnson, J., refers with approval, and in the following language, to the views on the subject contained on page 74 of *May on Insurance*: "Exceptions in a policy should be strictly construed, and where there are two interpretations equally fair, that which gives the greater indemnity should prevail." And on page 13 (27 Ohio St.) the same learned jurist says: "Stipulations in a contract providing for disabilities or forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced."

Let us recur to the exact words of forfeiture as they are set forth in the defendant's answer: "If . . . said assured should sell or transfer the property thereby insured, that said policy should become null and void." It was competent for the policy to provide expressly that a sale of a part of the property, or of an interest therein, should avoid the policy; this they did not do. The absence of a specific provision to that effect, when it could have been so easily inserted, together with the rule before referred to, that conditions which defeat a policy should be construed strictly against the forfeiture, leads us to hold that a sale of the entire interest of the party insured was necessary to avoid the policy.

In a strict legal sense, perhaps, wherever one engaged in business alone takes a partner into his business, or a firm re-

CASES
IN THE
SUPREME COURT
OF
OREGON.

MURPHY v. CITY OF ALBINA.

[23 OREGON, 103.]

CITY ENGINEER HAS NO AUTHORITY TO CHANGE CONTRACT FOR GRADING STREETS. — When a contract has been executed to grade a street of a city under the supervision of its engineer, it is the duty of such engineer to see that the contract is complied with, and the street brought to the grade as provided therein. He has no power, unless expressly authorized by the common council, to change the grade as established by the city, nor to impose upon the city any liability for extra work done by the contractor in excess of the work called for by his contract.

LAW OF CASE — EXTENT TO WHICH DECISION ON FORMER APPEAL IS. — The decision of the supreme court upon a former appeal in a case is, as to every point presented and decided on such appeal, the law of the case, binding upon both the parties and the court so far as the same state of facts is substantially presented, but no further.

MUNICIPAL CORPORATION, RATIFICATION BY, OF UNAUTHORIZED ACTS, NOW MADE. — A municipal corporation may become liable for services performed for it under the direction of its officers and agents, though in excess of their authority, provided they are accepted and ratified by it after being brought to its official knowledge; but mere silence or acquiescence on its part will not amount to a ratification; there must be some affirmative action in that respect, or action from which ratification can be inferred.

MUNICIPAL CORPORATION NOT BOUND BY INDIVIDUAL ACTS OF MEMBERS OF ITS COUNCIL WHEN. — When the liability of a municipal corporation depends on the action of its common council, such action must be had at a meeting thereof duly convened in some manner provided by law. Such liability cannot be based on individual acts of members of the council not done at an official meeting.

George A. Brodis, for the appellant.

W. T. Muir, city attorney, for the respondent.

BEAN, J. This is an action to recover on a *quantum meruit* for work and labor alleged to have been performed by plaintiff in grading, cutting, and filling one of defendant's streets, known as Margarett Avenue. This is the second appeal in this case. For the purposes of this appeal, the facts sufficiently appear in the case as reported (20 Or. 379), except from this record it appears that plaintiff, by his written contract, was to grade Margarett Avenue, a public street of the defendant, to the grade established by the city, as surveyed and established by Hulbert and McQuinn, and according to a profile made by them and made a part of the contract, the work to be done under the supervision of the committee on streets and public property, who should furnish the contractor with all necessary heights and distances, for which work he was to receive, on the approval in writing of the committee on streets and public property and engineer in charge, a certain rate per cubic yard for all necessary excavations and fills made by him, reference being made to a tracing made by the engineer in charge as to the number of yards of excavation or fill required.

The evidence tended to show that plaintiff proceeded to perform his contract, the engineer in charge setting stakes along the line of the work, giving the height as established by the defendant and provided in the contract. After he had finished grading according to the stakes set by the engineer, and was ready for laying sidewalk and planking, the engineer made a change in the grade-stakes of from three to ten inches of a rise in the grade, the entire length of the street, and directed plaintiff to bring the surface of the street up to this line. Plaintiff complained to the mayor and two members of the council of the action of the engineer in changing the grade, and was, by the mayor, told "to go ahead and finish his work according to the engineer's instructions, and quit his complaining, or he would not get paid for his work, or something to that effect"; that he did finish the work according to the instructions of the engineer, and was compelled to do four hundred and sixty-six dollars and twenty cents' worth of work more than called for in his contract and the estimates accompanying the same; that he told one member of the council and the mayor that if they did not rectify the mistake there would be damages claimed, and on the day the street committee was examining the work after its completion, he told them he should sue defendant for damages; that after the work was

completed, the defendant accepted and paid for all the work provided in the contract, but refused to pay for any extra work as ordered by the engineer. It does not appear that the council as an official body authorized or assented to the change in the contract or street grade by the engineer, or directly ratified the same; nor does it appear that the common council directed or had knowledge that the plaintiff was doing the extra work, or knew that it had been done at the time the work under the contract was accepted, unless it might be inferred from the fact that the mayor and two members of the council knew of the change in the grade, and the mayor directed the work, and a majority of the individual members of the council knew that plaintiff threatened to make some claim for compensation for the extra work ordered by the engineer.

The errors complained of are in the giving and refusal of certain instructions by the trial court. The instruction requested by plaintiff and refused by the court, the refusal of which we held to be an error on the former appeal, to the effect that if the extra work was ordered by the engineer and performed by plaintiff under the direction of the mayor and two members of the council, and the city, acting through its proper officers, accepted the same, the defendant is liable, was in substance given in the general charge, the court adding an explanation in the opinion, proper and necessary to a clear understanding by the jury, as to who are the proper officers, and how they must act in order to bind the city, and therefore requires no further consideration here. On this point the former decision was, that if the work was performed in improving the streets of defendant without regular authority, by direction of some person assuming to act for it, and was afterwards accepted by defendant, this would be a ratification, and equivalent to an original authority. But as to what would constitute an acceptance of the work was not in the case, nor considered or decided by the court. The record then before us showed "that when said work (extra work) was completed as ordered by the city surveyor, the same was accepted by the city of Albina," so that the only question was, whether, under such a state of facts, the city was liable for the reasonable value of the work.

But on the second trial the question of acceptance was the vital point in the case, and it was therefore proper and necessary for the court to instruct the jury fully upon this question,

and the instruction, as requested by plaintiff, furnished no guide for the jury as to who are the proper officers of the city, and as to what would amount to an acceptance of the work. It follows, therefore, that this case must depend upon the correctness of the instructions as given by the court. The jury was instructed, in effect, that in order for plaintiff to recover, it must appear that there was work done by plaintiff outside of his contract, at the request and with the knowledge of a majority of the members of the council, and that plaintiff made claim for the extra work, and the council, as an official body, recognized the claim and accepted the work, and that conversations with individual members of the council on the street would not amount to a contract or acceptance of the work, but in order to bind the city the council must have been together, acting as a body, and that if plaintiff did perform work outside of his contract, and the council simply undertook to accept the completion of the contract and pay what was earned under it, the city would not be liable for any extra work, although the members of the council may have been informed on the street, as individuals, that plaintiff claimed something for extra work. Certainly the defendant is not liable if it did not, as a municipal corporation, contract with or in any way authorize the plaintiff to do the extra work necessary to bring the street up to the grade established by its engineer, or by some corporate act ratify the contract or accept the work. Though it may be charged with the duty of regulating and repairing the streets, undoubtedly no action will lie against it for work or labor put upon them without its assent or authority. There is no room here for the contention that the defendant in any way contracted with or authorized plaintiff to perform this extra work. The only contract it made with him was the written one, which provided expressly that the work should be done according to the grade as established by Hulbert and McQuinn. The provision in the contract, that the work should be done under the supervision of the committee on streets and the engineer in charge conferred no authority upon either of them to change or modify in any essential particular the provisions of the contract: *Bonesteel v. New York*, 22 N. Y. 162; *Rens v. Grand Rapids*, 73 Mich. 237; *Dillon v. Syracuse*, 9 N. Y. Supp. 98; *Genovese v. Mayor*, 55 N. Y. Sup. Ct. 397.

When this contract was signed and executed, no officer of defendant had any authority to change its provisions, unless

expressly authorized by the common council. That body alone, or some one duly authorized by it, was competent to change the terms of the contract or the grade of the street. The duty of the engineer was to see that the terms of the contract were complied with and the street brought to the grade as provided therein, and for that purpose, and that alone, he was the agent of the city. But when he assumed to change the grade as established by the city, he was doing an unauthorized act, and one in no way binding upon the defendant. The change made by him was a material one, raising the surface of the street from three to ten inches above that established by the city, and if valid, imposed upon the defendant a liability for four hundred and sixty-six dollars' worth of work in excess of its contract, and that without its assent. If such an act be valid and binding on the defendant, there is but little protection for municipal corporations against the unauthorized acts of subordinate agents.

It was argued that the act of the individual members of the council in assenting to the change of the grade and directing the plaintiff to complete the work according to the instructions of the surveyor is binding upon the defendant, and the opinion upon the former appeal is relied on as the law of this case. As to every point presented and decided by this court in the former case, the decision becomes the law of the case, binding upon both the parties and this court so far as the same state of facts is substantially presented, but no further. As we have already said, the only question presented or decided on the former appeal was, whether the defendant was liable upon an implied contract for work performed on its streets under the direction of some unauthorized person after it had accepted the work. As to whether the individual members of the council could bind the defendant by contracts or agreements made, not as an official body, or what acts would constitute an acceptance of the work, were not presented, considered, or decided.

The opinion of the chief justice must be read with reference to the question actually before the court and the admissions and statements in the record, and when so read, the doctrine contended for by plaintiff finds no support therein. It is an elementary principle that the affairs of a corporate body, private or municipal, can be transacted only at a corporate meeting regularly convened, and that the acts of the individual members in no way bind the corporation. The only

existence of the common council of a municipal corporation is as a board, "and they can do no valid act except as a board, and such act must be by ordinance or resolution, or something equivalent thereto": 1 Dillon on Municipal Corporations, 455; 15 Am. & Eng. Ency. of Law, 1028; *Dey v. Mayor etc.*, 19 N. J. Eq. 412; *Butler v. Charlstown*, 7 Gray, 12; *Stoystown etc. Road Co. v. Craver*, 45 Pa. St. 386; *In re St. Helens Mill Co.*, 8 Saw. 88; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607.

The contract with plaintiff was formally entered into by the authority of the common council of defendant, and if a change were desired, it could only be made by the same parties that made the contract, — the common council or its authorized agent on one side, and plaintiff on the other. Declarations or agreements of one or more, or even all, of the councilmen, not at an official meeting, that they would be willing to consent to a change in the grade and allow plaintiff extra pay for the increased work, do not bind the defendant. The defendant could consent to a change in the contract only by its council acting as a body or through some authorized agent, and not by the several members of the council acting as individuals: *Stoystown etc. Road Co. v. Craver*, 45 Pa. St. 386; *Schumm v. Seymore*, 24 N. J. Eq. 143. The work, then, having been performed by plaintiff without any contract with or authorization by the defendant, it follows that it is not liable, unless it has by some corporate act ratified or assented to the same. The only body competent to accept the work or ratify the contract is the common council of the defendant, and it can only act when duly convened in some manner provided by law. Corporations may be, and often are, bound by implied contracts within the scope of their powers, to be deduced by inference from authorized corporate acts without either a vote or resolution of their governing bodies: 1 Dillon on Municipal Corporations, sec. 459. And where a contract has been entered into in good faith, and the city has received the benefit of the performance, a ratification of the unauthorized contract may, under some circumstances, be inferred without any formal action of the corporate authorities; but when the work is performed upon a public street of a municipality without its assent, no implied contract can be inferred from the fact that the street is subsequently used by the public: *Taft v. Montague*, 14 Mass. 281; 7 Am. Dec. 215; *McDonald v. Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; *Davis v. School Dist.*,

24 Me. 849; *Pratt v. Swanton*, 15 Vt. 147; *Wilson v. School Dist.*, 32 N. H. 118; 1 Dillon on Municipal Corporations, sec. 464. In such case, to render the municipal corporation liable, the contract must be ratified or the work accepted by some express act of the council. Any other doctrine fails to extend to municipal corporations the privileges and immunities that are accorded by law to other contracting parties, public or private.

Nor can any inference of acceptance or ratification be deduced from the acts of the council in accepting or paying for the work performed under the written contract. This it not only had a right but by its contract was bound to do. And because it complied with the terms of its contract, no inference can be drawn that it intended to accept any work performed without its authority or assent: *Durango v. Pennington*, 8 Col. 257. Before it can be held to have accepted the work performed by plaintiff by the direction of the engineer and individual members of the council, it must appear by some affirmative act that it accepted the work, or from which such acceptance can be inferred. Mere silence is not sufficient; for if so, it would require a meeting of the council and an express dissent every time an officer undertakes to impose an unauthorized liability upon the city to enable the corporation to prevent ratification: *Otis v. Stockton*, 76 Me. 506. Of course, there may be times when a corporation as well as an individual should act or speak, or when it does speak by the force of circumstances; but such is not this case.

It is urged that the court erred in holding that the knowledge that plaintiff made some claim for extra work, obtained by individual members of the council on the street, would not bind them, when they came to vote upon the resolution offered, to accept the work performed under the contract with plaintiff, unless the plaintiff made such claim at the time the resolution was under consideration. In support of this contention, reliance is had upon the language of the court in the former opinion, that "two of the members of the council, and the mayor, who authorized the work, had knowledge of their own acts in directing the work to be done; and when they met and accepted it, it is difficult to see why the city was not thereby rendered liable." It will be observed that this statement is also based upon the fact that the work was accepted by the council at an official meeting; and it was held that having so accepted the extra work, the defendant was liable without any formal reso-

lution authorizing or ratifying the act of the engineer and individual members of the council in directing it to be done, and that the ratification would be implied from the act of accepting the work with knowledge that plaintiff claimed pay therefor. But it is not perceived how knowledge that plaintiff claimed pay for work performed under an unauthorized contract can render the defendant liable until it has done some act amounting to an acceptance of the work or ratification of the contract. Even had the individual members of the council who had knowledge of and directed this work agreed with plaintiff to ratify the contract at a subsequent meeting of the council, such arrangements would have been contrary to public policy, and not binding upon them when they came to act officially upon the question: *McCortle v. Bates*, 29 Ohio St. 419; 23 Am. Rep. 758. A sufficient answer to the suggestion that the conclusion we have reached works a hardship upon plaintiff, who in good faith performed the extra work, supposing that the persons who directed it to be done were authorized to do so, is, that every person dealing with the agents of a municipal corporation must, at his peril, see that such agents are acting within the scope of their authority and line of their duty, and if he make an unauthorized contract, he does so at his own risk. The courts cannot disregard the well-settled rules of law, in order to avoid an apparent injustice in a particular case.

The judgment of the court below is therefore affirmed.

MUNICIPAL CORPORATIONS — RATIFICATION BY, OF UNAUTHORIZED ACTS. — Municipal corporations cannot be presumed to ratify and confirm the acts of their agents or officers, but acts of ratification by such bodies politic should be direct and explicit, with full knowledge of the facts: *Mayor v. Reynolds*, 20 Md. 1; 83 Am. Dec. 435, and note.

AGENCY — ACTS OF PUBLIC AGENTS, HOW FAR BINDING. — The acts of an agent of the government or of an individual are binding only to the extent of the authority conferred: *Martin v. United States*, 2 T. B. Mon. 89; 15 Am. Dec. 129, and note. The government, or any other public body, is not bound by the acts, declarations, or representations of its agent, unless it manifestly appears that the latter is acting within the scope of his authority: *Mayor v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535, and note.

LAW OF CASE. — A construction placed upon a deed of trust by the supreme court, reversing the judgment and remanding the cause for a new trial, is the law of the case, and the question of its correctness will not be considered upon a second appeal: *More v. Calkins*, 95 Cal. 435, *ante*, p. 131, and note.

STATE v. GEORGE.

[22 OREGON, 142.]

OFFICERS, POWER TO APPOINT, NOT EXCLUSIVELY EXECUTIVE, BUT MAY BE EXERCISED BY LEGISLATURE. — The power to appoint to office is not a power belonging exclusively to the executive branch of the government of Oregon, but may, in some instances, be exercised by the legislature.

OFFICERS, MEMBERS OF BRIDGE COMMITTEE, UNDER "MEUSSDORFFER ACT," ARE NOT. — The members of the bridge committee provided for by the Oregon act of February 18, 1891, known as the "Meussdorffer Act," are not officers within the meaning of that term as used in the constitution of that state, but mere agents of the city of Portland for the performance of certain duties defined by the act.

DELEGATION OF LEGISLATIVE POWER — AUTHORIZING CERTAIN JUDGES TO APPOINT BRIDGE COMMITTEE IS NOT. — It is not a delegation of legislative power for the legislature to authorize certain judges of the circuit court of the county to appoint the bridge committee provided for by the "Meussdorffer Act," nor is the authority so given in conflict with the constitution of Oregon. And moreover, the power to appoint may be upheld, on the ground that the judges, in performing this duty, act as individuals, and not as judges.

ELIGIBILITY OF MEMBER OF LEGISLATURE TO SERVE ON BRIDGE COMMITTEE UNDER "MEUSSDORFFER ACT." — A member of the legislature which enacted the "Meussdorffer Act" is not disqualified to serve, during the term for which he was elected, as a member of the bridge committee created by the act, since the position of a member of that committee is not an office within the meaning of the constitution.

PROCEEDING in the nature of a *quo warranto*, brought to try the title of the respondents to hold the office of member of the bridge committee, under the act of the legislative assembly commonly known as the "Meussdorffer Act." Section 2 of that act provided that the power and authority given to certain cities named in the act, since consolidated as the city of Portland, to construct, purchase, hire, keep up, and maintain bridges across the Willamette River, and to issue and dispose of bonds therefor, should be exercised by eight tax-payers of Multnomah County, to be appointed by the two judges of the circuit court of that county, who should be styled the "Bridge Committee." The two judges, acting in pursuance of the act, and within the time limited therein, duly appointed the respondents to the position of bridge committeemen. The committeemen met within the time prescribed in the act, qualified, and organized in all respects in conformity with the law. The petition alleged that the defendants, ever since their appointment, and under it, had acted as and claimed to be, and still were acting as and claiming to be, the bridge committee; that claiming to be said bridge committee, they

were about to issue, sell, and dispose of a large amount of negotiable bonds, etc., as provided for in said free bridge act, which said bonds would be a burden upon the property of the relator and other citizens and tax-payers of the city of Portland, and subject them to expensive litigation in order to prevent the assessment and collection of taxes upon their property, for the payment of the principal and interest of such bonds, etc., and concluded with a prayer for a judgment of ouster. The defendants demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and rendered judgment dismissing the action, and the relator appealed.

T. A. Stephens, district attorney, and Paxton and Paddock, for the appellant.

William T. Muir, city attorney, for the respondents.

LORD, J. The question presented for our determination arises upon the sufficiency of the facts to show whether or not the defendants are entitled to hold the office of bridge committee and to exercise the functions thereof. The aim of the proceeding is to test the constitutionality of the method provided by the act (Laws 1891, p. 633), commonly known as the Meussdorffer Act, for the appointment of the bridge committee. It is insisted that the facts alleged show that the defendants are holding the offices of bridge committee and exercising the functions thereof without title or legal right, because the two judges of the circuit court for Multnomah County, referred to in the act, are prohibited by article 3 of the constitution from exercising the appointing power, or any function other than judicial. This proceeds upon the assumption that the act of the two judges of the circuit court in appointing the bridge committee was not a judicial duty, nor a function pertaining to the judicial department of the government. By article 3 of the constitution the powers of the government are divided into three separate departments, — the legislative, the executive, including the administrative, and the judicial, — and any person charged with official duties under one of these departments is prohibited from exercising the functions or powers confided to either of the other departments, except as in the constitution expressly provided.

It is claimed that the two judges of the circuit court, no matter whether they are referred to in the Meussdorffer Act as individuals or judicial officers, are persons charged with

official duties under the judicial department of the government, as the members of the legislature are under the legislative department, and that this constitutional provision prohibits the legislature from conferring upon such judges, and such judges from exercising, the power of appointment conferred by the act, and hence such act and all appointments under it are void. There can be no doubt that there are authorities to the effect that the exercise of the power of appointment to office is an executive act, and that being such, the power cannot be exercised by the legislature or judiciary under a constitutional provision distributing the powers of government into three separate departments like our own. But this question, although not directly passed upon by the court in *Biggs v. McBride*, 17 Or. 640, nevertheless received a good deal of its attention. The point was there made, that so much of the act creating the offices of railroad commissioners as undertook to fill them by an election in joint convention of both houses of the legislature was in conflict with the constitution and void. After referring to article 3 and section 1 of article 5 of the constitution, Strahan, J., said: "Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of the chief executive power of the state, the appellant's contention would be sustained, but no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogatives in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or in some cases of changing the method of filling an existing office." After proceeding to enumerate several instances in which the power had been exercised by the legislature in making these appointments of office, which were in no way connected with the discharge of legislative duties, he concluded his opinion on this point by saying: "The power exercised by the legislature in the appointment of some of these officers is almost coeval with the constitution. The power thus exercised has never been

called in question, but has ever been acquiesced in by every department of the government, and is in itself a contemporaneous construction of the constitution, which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such construction is entitled to great weight, and could not be lightly regarded."

Except as limited by constitutional restrictions, it is agreed that the legislature may exercise all governmental powers. It is the law-making power of the state. "Plenary power in the legislature," said Denio, J., "for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception": *People v. Draper*, 15 N. Y. 543. While our constitution separates the powers of government into three distinct departments, and prohibits any of them from exercising any powers confided to the other, it does not undertake to declare what shall be considered legislative, executive, or judicial acts. As Walker, J., said: "That provision declares only, in general terms, that each department of government shall be confined to the exercise of the functions of its own department. It does not undertake to define in any specific manner what are legislative, executive, or judicial powers or acts. Like most other provisions of that instrument, the terms employed are of the most general and comprehensive character. We find no provision that declares that the appointment of a municipal officer, however extensive his powers, is the exercise of a legislative or executive power": *People v. Morgan*, 90 Ill. 562.

But it is argued that if it be conceded that *Biggs v. McBride*, 17 Or. 640, established the principle that the legislature, in the appointment of the railroad commissioners, had not encroached upon the executive department of the government, they were state officers, charged with official duties to be exercised for the benefit of the state at large, and appointed for a fixed term, while the members of the bridge committee provided for by the Meussdorffer Act are municipal officers, or a municipal board of local authority in which the state generally has no interest, and appointed for an indefinite term. Hence it is claimed, even though the legislature may exercise the power to appoint such state officers of general authority, that it has not the power to make appointments to fill municipal offices for an indefinite term. But it seems to us the force of this contention is broken by the case of *David v. Portland Water Committee*, 14 Or. 98. The duties of that board

or committee, in principle, were like the duties of the defendant bridge committee. If the members of the water committee were not officers in the sense of the constitution, but "no more than agents of the city," as held in that case, the members of the bridge committee must likewise be agents for the city, and not officers, within the meaning of the constitution. It would be difficult to show, upon principle, by a comparison of the acts wherein they differ, that the members of the water committee are agents, and the members of the bridge committee officers. That the persons named by the act as the bridge committee were, as Thayer, J., said of the individuals designated as the water committee, "officers in the broad sense of that term, there can be no question; but whether they were such officers as were intended by said section 8, article 15, of the constitution, is very doubtful. In order to be such officers, they must have been elected or appointed to an office under the constitution, which I understand to be an office provided for by that instrument." The same would be true of the bridge committee, so far as this section of the constitution applies. But the court, in *David v. Portland Water Committee*, 14 Or. 98, based its decision upon the principle decided in *McArthur v. Nelson*, 81 Ky. 67. In that case, the act authorized the judge of the circuit court to appoint three commissioners of the district, who should hold their office at the will and pleasure of the judge. It was made the duty of the commissioners to have constructed a court-house at a cost of not to exceed a sum specified; and to enable them to raise the money, they were authorized to issue bonds, to redeem them, and to levy an annual tax upon the real and personal property of the district. In determining the question as to whether such commissioners were officers or not under the constitution, Pryor, J., said: "Nor do we think it was necessary for the legislature to prescribe the term of office for the commissioners, although they are made a body corporate and politic, with power to sue and be sued, contract and be contracted with, under the style of 'Commissioners of the Court-house District.' They are not district officers within the meaning of section 10 of article 6 of the constitution, but are mere agents of the district, required by the act to discharge certain duties with reference to the building of a court-house, and when those duties end, their employment terminates. . . . To hold that such commissioners are to be selected, and when selected to be removed as officers, within the meaning of the constitution,

would be determining by judicial precedent that every one charged with the execution of a ministerial duty under legislative sanction is an officer, whose term must be designated, or the appointment will be held invalid."

In commenting upon that case, Thayer, J., said: "The question involved in that case is very similar to the one here, and the language of the court expresses the view we entertain regarding it,—that the members of the water committee are no more than agents of the city, required by the act to carry out its provisions, as was said in that case regarding the commissioners to build the court-house." Within the principle here decided, the vice of the argument for appellant lies in assuming that the members of the bridge committee are officers. Counsel proceed upon this hypothesis, but contend that, being municipal officers of local or limited authority, their appointment by the legislature cannot be sustained; for their duties are not such as to affect the state at large, and cannot therefore be upheld, as in the case of the appointment of state officers to discharge duties in which the general public are interested. Moreover, if the members of the bridge committee are not officers, but agents appointed to carry out the provisions of the act, the argument can have no application. In the absence of constitutional restrictions, the power of the legislature over municipal corporations is unlimited, except so far as they are endowed with rights incident to a private corporation: *Dillon on Municipal Corporations*, 3d ed., sec. 66. Counsel for the appellant, recognizing the effect of these decisions upon the pending question, and the practice of our legislature, coeval with the formation of the state government, to create and fill a certain class of offices, further argue that if it be admitted that the legislature had power under these decisions (*Biggs v. McBride*, 17 Or. 640, and *David v. Portland Water Committee*, 14 Or. 98) not only to create the bridge committee, but to appoint the persons constituting the same, this power cannot be delegated by the legislature to the judges of the circuit court, to be exercised by them in the appointment of the members of the committee. It is, no doubt, true that the legislature cannot delegate the powers conferred upon it. The general rule of law to this effect is unquestioned. But this refers to the delegation of the law-making power. It prohibits the delegation of authority to legislate, or to devolve upon others duties which must be performed by it as a legislative body. Every law must be executed, if at all, by

some one charged with that particular duty. Laws special in their nature, and of the kind in question, as in *David v. Portland Water Committee*, 14 Or. 98, may be carried into effect by agents appointed for that purpose. Within that decision nothing more or less has been done in this case. The legislature exercised its function in enacting the law and directing the manner of its execution.

Nor is the authority given by the act to the two judges of the circuit court to appoint the members of the bridge committee, even considered as officers, without judicial precedent to sustain it, as not in conflict with section 1 of article 3 of our constitution. In Illinois there is a like provision, substantially: Ill. Const., art. 3; Starr and Curtis's Rev. Stats. 109. In *People v. Morgan*, 90 Ill. 558, the power of the judiciary to appoint certain officials, whose duties are not strictly judicial, or even connected with the business of the courts, was fully recognized and sustained. A statute of that state which authorized the judge of the circuit court of Cook County to appoint assessors and commissioners for the South Park, located in that county, was held to be constitutional. The point was expressly made that the circuit judge could not appoint a park commissioner, on the ground that he was thereby exercising an executive or political function, forbidden by the clause of the constitution referred to. The point was, however, overruled, and the power of the judge or judges to make the appointment was sustained. After giving numerous examples of official appointments made by the judges or courts, Walker, J., said: "The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. The instrumentalities employed for that purpose are officers, elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function, unless made so by the organic law or legislative enactment; and in this case it is not so, unless the power is thus conferred. If it were conceded that these appointments were the exercise of political power, would it necessarily be violative of any provision of the constitution? The division and allotment of powers are not into political, executive, and judicial, but into legislative, executive, and judicial. It was no doubt the exercise of political power, as that embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other. Political power is the policy of government or its administration,

and may be exercised either in the formation or administration of government, or both. Hence it follows that if it be a political power, that of itself in no wise militates against its exercise by a person belonging to the judicial department of the government. . . . All three departments aid in the administration of government, but perform different functions. The elector who votes for an officer or measure exercises political power; yet no one would claim that because a judge was a person belonging to the judicial department, he was prohibited from thus voting. We therefore conclude that if the power to appoint to office is a political function, this article of the constitution does not prohibit its exercise because the power is political; and if prohibited, it must be for some other reason, or by some other provision which, in terms or by necessary implication, prohibits such an exercise of the appointing power." And again he says: "But this is not a question as to what department these officers belong, or the functions they perform; but the question is, What department, in the absence of an election, can constitutionally confer the power on them to perform public duties? It is, not whether the general assembly, the executive, or the judiciary are the best qualified to select and appoint such officers, but where is the power to do so lodged? The original power to fill all offices rests with the people, but our constitution has vested the power in the governor to fill all constitutional offices not provided for by election or otherwise."

In *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, it was held that section 1, article 2, of the election law of 1885, for cities, etc., which provides for the creation of a board of election commissioners, consisting of three members, and directs that they be appointed by the county court, is not violative of that provision of the constitution dividing the powers of government into three departments, and prohibiting any one of such departments from exercising powers properly belonging to either of the others. It was there urged that the appointment of the commissioners could not be conferred upon the county court, because such appointment involves an exercise of political power, while the functions of the county court are exclusively judicial. But Magruder, J., said: "The reasoning in *People v. Morgan*, 90 Ill. 558, shows that it was never intended to vest in the governor the selection of such local and municipal officers as these commissioners. The power to appoint officers of this class is not specifically designated in

the constitution as either a legislative, judicial, or executive power. It is not therein specifically conferred on either department. Nor is there anything therein expressed which, either directly or impliedly, prohibits the legislature from authorizing the county court to appoint the commissioners. Therefore, the authority conferred on that court to do so does not make the act invalid. The law-making powers of the states can do any legislative acts not prohibited by the state constitution."

A statute of the United States authorizes the circuit courts of the United States to appoint supervisors of elections in certain cases and under certain conditions therein specified. In *Ex parte Siebold*, 100 U. S. 371, the point was made that the United States circuit courts had not the power to appoint supervisors of election, on the ground that the duties of such courts were judicial, while the supervisors of election were officers whose duties were executive in their character. But the court held otherwise, Mr. Justice Bradley saying: "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department, to which the duties of such office appertain. But there is no absolute requirement to this effect in the constitution; and if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment is, in ordinary cases, left to the President and the Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it would be in the President alone, in the department of justice, or in the courts. The marshal is pre-eminently the officer of the courts; and in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated."

But, independent of these considerations, the power to appoint the bridge committee may be upheld on the ground that the two judges of the circuit court for Multnomah County in performing this duty act as individuals, and not as judges. This conclusion the court thought, in *People v. Morgan*, 90 Ill. 558, might be drawn from the act authorizing the circuit judges of Cook County to appoint park commissioners; Walker, J.,

in speaking for the court, saying: "The power might, no doubt, be sustained on the ground that its exercise is the act of the individual, and not the performance of an official function; that the act referring to the judge was only intended to apply to the person who filled the office at the time when the appointment was required to be made, whether it should be the same or a different person, thus being the individual act of the incumbent. . . . So that, whether the appointment of these park commissioners be the exercise of a judicial, ministerial, or other function, — whether it be the act of the officer as such, or as an individual, — we are of the opinion that the power was well conferred, and might be properly exercised by the circuit judge."

In view of these considerations, our decisions and those of other courts, and the power exercised by the legislature in making a certain class of appointments, almost coeval with the constitution, it is immaterial whether the appointment of the members of the bridge committee by the judges be considered the exercise of a judicial, ministerial, or other function, or it be the act of the judges as such, or as individuals, or whether the members of the committee be considered as agents of the city, and not officers, the result is the same, and affirm the validity of the act granting the power.

The second question presented for our determination is, whether the appointment of the defendant C. H. Meussdorffer as a member of the bridge committee is valid, he being a member of the legislature which passed the act. The contention of the appellant is, that he was not eligible to be appointed a member of the bridge committee, because such appointment is in conflict with section 30 of article 4 of the constitution. That provision is as follows: "No senator or representative shall, during the time for which he may have been elected, be eligible to an office the election to which is vested in the legislative assembly," etc. Within the meaning of the constitution, as held in *David v. Portland Water Committee*, 14 Or. 98, under a statute of similar import, the position of bridge committeeman is not an office. He is a mere agent of the city. So that, turn over this case as we may, keeping in view the well-recognized rule that doubt must be solved in favor of the validity of the law, and that a law, to be invalid, must clearly conflict with the constitution, we must affirm the judgment.

OFFICERS — POWER OF LEGISLATURE TO APPOINT. — The power of appointment to office is not essentially an executive function. It may be regulated by law, and if the law so provides, may be exercised by the legislature: *People v. Freeman*, 80 Cal. 233; 13 Am. St. Rep. 122, and extended note, in which this question is thoroughly discussed; *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572, and note 595. The legislature has no power to appoint permanent officers for a full term, whose duties are purely municipal: *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103, and note. The legislature has no power, under the constitution, to appoint local municipal officers: *State v. Denny*, 118 Ind. 382.

LEGISLATURE — DELEGATION OF POWER OF. — A statute providing that certain persons shall select a site for a public building is not an unlawful delegation of public powers: *People v. Dunn*, 80 Cal. 211; 13 Am. St. Rep. 118, and note. The legislature, in creating an office, may provide that it shall be filled either by election or appointment, which appointment may be made, if the law so directs, by the governor or by an administrative state officer: *State v. Gorby*, 122 Ind. 17. But if the legislature has no power to do an act, it cannot delegate the power to do such act to a court of chancery: *Pearce v. Patton*, 7 B. Mon. 162; 45 Am. Dec. 61.

OFFICERS. — POWER OF ONE PERSON TO HOLD TWO OFFICES: See note to *De Turk v. Commonwealth*, 15 Am. St. Rep. 708; note to *Crown v. Commonwealth*, 10 Am. St. Rep. 855. The appointment of a member of the legislature to office, in violation of a constitutional provision, is void: *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169, and note.

RUTHERFORD v. HILL.

[23 OREGON, 212.]

INCORPORATORS OF UNORGANIZED CORPORATION NOT LIABLE AS PARTNERS.

— Where three or more persons execute and file articles of incorporation under the laws of Oregon, and do nothing further towards effecting an organization or carrying on the proposed business, they do not thereby become liable as partners, although one of them assumes the corporate name, under which he does business and incurs liabilities.

ACTION against the defendants as partners under the name and style of the Himes Printing Company. The complaint alleged that the defendants executed, acknowledged, and filed in the office of the county clerk, and in the office of the secretary of state, certain articles of incorporation as the Himes Printing Company; that they negligently failed to provide a stock-book and to secure stock subscriptions to said corporation, as required by law; that they nevertheless undertook to carry on the business provided for in said articles of incorporation, appointed one George H. Himes superintendent of their said business, and authorized him and the defendant Sherman Martin to represent them in all the transactions

of said business; that said business was carried on under the firm name and title of the Himes Printing Company; that between May 1, and September 1, 1891, the plaintiffs, at the instance and request of the defendants, through their agents aforesaid, performed certain labor and services for the defendants, relying on the credit and representations of the defendants for their payment. Earhart and Hill answered separately, each denying every material allegation of the complaint, except that they did not deny executing and filing the articles of incorporation of the Himes Printing Company. The jury returned a verdict against Earhart and Hill for the amount claimed, and from the judgment entered thereon an appeal was taken. Other facts are stated in the opinion.

George H. Durham and J. F. Watson, for the appellants.

Wallace McCammant, for the respondents.

STRAHAN, C. J. At the conclusion of the evidence, the defendants Hill and Earhart asked the court to instruct the jury as follows: "1. The execution and filing of the articles of incorporation of the Himes Printing Company by said Hill and Earhart, in connection with the defendant Sherman Martin, would not itself make them partners with Martin, or render them liable in this action. 2. Said defendants Hill and Earhart cannot be charged in this action, unless it has been shown by a preponderance of the evidence that they had notice of their being held out as such partners, and plaintiffs also had notice thereof before or at the time they performed the labor and services alleged in the complaint, and performed the same on the faith thereof. 3. The plaintiffs cannot recover in this action against Hill and Earhart, unless it has been proved by a preponderance of the evidence that said Hill and Earhart were partners in said printing company at the time the contract for said labor and services was entered into or at the time the same were performed, or at the time the contract was entered into or said labor and services performed undertook to carry on said business of said company, or were interested as partners, or appointed or participated in the appointment of George H. Himes as superintendent of said business, or authorized him or said Martin to represent them in the transaction of said business, or requested, through said Himes or Martin, the plaintiffs to perform said labor and service." No. 4 was, in effect, a direction to the jury to return a verdict for the defendants Hill and Earhart. The defendants excepted to the

rulings of the court in refusing to give each of the foregoing instructions.

The court then instructed the jury as follows: "I cannot agree with you, Mr. Durham and Judge Watson, that there may not be some other reasons why parties should not be bound than such as usually arise from an estoppel. Since this case has been going on, it has occurred to me whether or not this may not furnish a class of itself for pronouncing a man to be a partner. As a general rule, the doctrine of estoppel has got to be made out according to the authorities you have read; but I am inclined to the opinion that the mere act of filing articles is itself a holding out and notice to the world that they are associated in the business that is carried on under the name. I do not feel very certain about it, but my best conception of this matter is, that it ought to be considered the rule." An exception to this instruction was duly noted. The court also gave the following instruction: "If you find from the evidence in this case that these two defendants and Sherman Martin filed articles of incorporation for the purpose of carrying on the printing business under the name of the Himes Printing Company, and that thereafter one of these men, to wit, Sherman Martin, took up the business contemplated by this corporation and carried it on under that name, and incurred liabilities, then all these incorporators that signed the articles are liable, and your verdict should be for the plaintiffs for the amount claimed, provided you further find that before they performed the labor and rendered the services they ascertained the fact of these articles being filed, and acted on the faith of the association of these defendants with Sherman Martin, and that they were induced thereby to perform the labor and render the services." An exception was also taken to this instruction.

There was no evidence whatever before the jury that these defendants had anything to do with the business of the Himes Printing Company, or in any way authorized the same, except to sign the articles of incorporation. They appointed no agents and employed no laborers, purchased no material, nor did they have any knowledge that any business was conducted under that name, except the company did some printing for the defendant Hill; and when a bill was presented to him for the same, it had at the top, printed in bold letters, "The Himes Printing Company, Incorporated. George H. Himes, Superintendent; Sherman Martin, Manager." There was no

evidence before the jury that the plaintiffs had any actual knowledge of the filing of the articles of incorporation at the time they performed the services sued for.

The sole question, therefore, seems to be, whether or not, where three or more persons sign, acknowledge, and file articles of incorporation under the laws of this state, and do nothing further towards effecting an organization or carrying on the proposed business, and one of them assumes to do business under the proposed corporate name and incurs liabilities, the other persons who signed said articles are liable. Appellants maintain that in such case there is no liability on the part of those who do not participate in the business either directly or indirectly, while the respondents seek to maintain the reverse of this proposition; and this contention presents the only question we need consider on this appeal.

The respondent contends that the executing and filing of the articles of incorporation, and the assumption of the corporate name by one of the parties, under which he does business, create a partnership between all the persons signing said articles; and to sustain this view, he relies upon these authorities: *Whipple v. Parker*, 29 Mich. 369; *Jessup v. Carnegie*, 44 N. Y. Sup. Ct. 260; *Coleman v. Coleman*, 78 Ind. 344; *Pettis v. Atkins*, 60 Ill. 454; *Smith v. Warden*, 86 Mo. 382; *Garnett v. Richardson*, 35 Ark. 144; *Lindley on Partnership*, 5; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Johnson v. Corser*, 34 Minn. 355. Some other authorities similar to these in principle might be cited, but they add nothing to this side of the question. Without stopping to distinguish these cases from the one now before us, we think the decided weight of authority, as well as the better reason, is the other way. *Fay v. Noble*, 7 Cush. 188, is an early case, in which it was held that the subscribers for and holders of stock in a manufacturing corporation which has been defectively organized, and transacted business under such defective organization, do not thereby become partners, general or special, in such business. In *Trowbridge v. Scudder*, 11 Cush. 83, it was held that the stockholders of a corporation do not become liable as partners on notes given by the treasurer of the corporation, merely because, after organizing, they transacted no business. In *First Nat. Bank v. Almy*, 117 Mass. 476, it was held that the members of a corporation were not liable as partners by reason of having transacted business before the whole capital stock was paid in, as required by statute. In *Humphreys v. Mooney*, 5 Col. 282, in considering the question

now before the court, it was said: "The doctrine of a partnership liability in such case is not founded in law or reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability." Substantially the same doctrine is announced in *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Planters' etc. Bank v. Padgett*, 69 Ga. 159; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Ward v. Brigham*, 127 Mass. 24; *Central etc. Bank v. Walker*, 66 N. Y. 424; *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643; *Blanchard v. Kaul*, 44 Cal. 440; Morawetz on Private Corporations, sec. 748. And 17 Am. & Eng. Ency. of Law, 866, after stating that the rule contended for by respondents had been adopted by quite a large number of cases, remarks: "But the weight of authority perhaps sustains the contrary rule, that if they were acting under the supposition that they were incorporated, and were assuming only the liability of stockholders, and not that of partners, they will not be held liable as such"; and a long list of cases is cited to sustain this proposition.

It is not doubted that cases might arise, and can readily be imagined, where the incorporators sought to be charged might take such part in conducting the business, or hold themselves out to the world as partners or as principals in the business, that they would be held liable; but this would grow out of their conduct in carrying on the business, and not out of the mere fact of signing and filing the articles. If the appellants could be held liable in this case, such liability would rest on the mere act of signing and filing the articles, and not upon any participation in the business, either directly or indirectly. It would have to rest upon the theory that by the mere signing the articles with Martin they constituted him their general agent to proceed to conduct the business contemplated by the proposed corporation, thus creating a liability for any act of his done within the scope of the powers of the proposed corporation.

No authority to which our attention has been directed has gone so far, and we feel safe in saying that none can be found to support that doctrine. We therefore reverse the judgment, and remand the cause for such further proceedings as are not inconsistent with this opinion.

PERSONAL LIABILITY OF PERSONS ACTING AS CORPORATION, BUT WITHOUT AUTHORITY. — The question whether or not the members of an association, who have attempted to organize a corporation, but have so far failed to com-

ply with the requirements of the law that no valid incorporation is effected, become individually liable as partners or otherwise, is one upon which the authorities are nearly equally divided. Perhaps the greater weight of authority sustains the rule that where the law authorizes the formation of a corporation with the powers assumed, and an effort is made in good faith to organize a corporation, and thereafter, and as a result of such effort, corporate functions are assumed and exercised in the belief that a valid corporation exists, persons who have dealt with the association as a corporation, and have given credit to it, and not to its individual members, cannot hold such members liable individually or jointly, as partners or otherwise, although the omission to comply with the requirements of the law was such that no valid or legal organization of a corporation was effected: 2 Morawetz on Private Corporations, sec. 748; Taylor on Private Corporations, 2d ed., sec. 148; 17 Am. & Eng. Ency. of Law, 866; *Snider Sons' Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887; *Cory v. Lee*, 93 Ala. 468; *Mokelumne Hill M. Co. v. Woodbury*, 14 Cal. 424; 73 Am. Dec. 658; *Blanchard v. Kaull*, 44 Cal. 440; *Humphreys v. Mooney*, 5 Col. 282; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Planters' and Miners' Bank v. Padgett*, 69 Ga. 159; *Fay v. Noble*, 7 Cush. 188; *Troubridge v. Scudder*, 11 Cush. 83; *First National Bank of Salem v. Almy*, 117 Mass. 476; *Merchants' and Manufacturers' Bank v. Stone*, 38 Mich. 779; *Stout v. Zulick*, 48 N. J. L. 599; *Vanneman v. Young*, 52 N. J. L. 403; *Raisbeck v. Oesterricher*, 4 Abb. N. C. 444; *Methodist Church v. Pickett*, 19 N. Y. 482; *Buffalo & A. R. R. Co. v. Cary*, 26 N. Y. 75; *Fuller v. Rowe*, 57 N. Y. 23; *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Merriman v. Magiveny*, 12 Heisk. 494; *American Salt Co. v. Heidenheimer*, 80 Tex. 344; 26 Am. St. Rep. 743; *Harrod v. Hamer*, 32 Wis. 162; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Whitney v. Wyman*, 101 U. S. 392. In delivering the opinion of the court in *Fay v. Noble*, 7 Cush. 192, Bigelow, J., said: "We are not aware of any authority . . . to warrant the instruction that in consequence of an omission to comply with the requisitions of law in the organization of a corporation, by which its proceedings were rendered void, persons who had subscribed for and taken stock in the company thereby became copartners. The doctrine seems to us to be quite novel and somewhat startling. Surely it cannot be, in the absence of all fraudulent intent, . . . that such a legal result follows as to fasten on parties involuntarily for such a cause the enlarged liability of copartners, — a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. No such result can follow, unless a principle of law be established, founded on no authority and required by no public exigency. Corporations are known and recognized legal entities, with rights and powers clearly defined and well understood, and wholly distinct and different from those of individuals and copartnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities, which they voluntarily assume, and these liabilities are not to be extended and enlarged so as to affect innocent parties, beyond the letter of the law." And Clopton, J., delivering the opinion of the court in the recent case of *Snider Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, said: "The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning, consistent with well-settled principles, and in harmony with the policy of the state." And in *Central City Bank v. Walker*, 66 N. Y. 424, the rule that

stockholders are not liable as partners was applied to a case where the corporation had expired by statutory limitation, and its general agent continued to carry on the business and incurred liabilities, the stockholders defendant not having been aware that the corporation had expired, and not having intended to bind themselves personally, although they had received dividends six months after the expiration of the time for which the corporation was chartered to exist. And where several persons sign articles of association, fix the amount of the capital stock, choose officers and issue certificates of stock, intending to become a corporation, but fail to complete the organization or to become a corporation, and some of them go on and do business, intending to turn the affairs over to the corporation when formed, the associates do not thereby become liable as partners: *Ward v. Brigham*, 127 Mass. 24.

But where the organization of the corporation never had any appearance of validity, or where the associates incur liabilities knowing that their incorporation is ineffective, they will be held liable as partners: *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Land Grant R'y & T. Co. v. Board of County Commissioners*, 6 Kan. 245; *Montgomery v. Forbes*, 148 Mass. 249; *Hill v. Beach*, 12 N. J. Eq. 31; *Booth v. Wonderly*, 36 N. J. L. 250; *National Union Bank of Watertown v. Landon*, 45 N. Y. 410; *Medill v. Collier*, 16 Ohio St. 599; *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; 17 Am. & Eng. Ency. of Law, 866; Taylor on Private Corporations, 2d ed., sec. 148. In *Montgomery v. Forbes*, 148 Mass. 249, the defendant Forbes who had organized, but not in good faith, what he believed to be a valid corporation, but which was in fact legally invalid, bought goods in the name of the corporation for his sole benefit, and gave in payment a promissory note in the name of the corporation. It was held that the seller of the goods might treat the note as void, and recover against the buyer personally on the original contract for goods sold and delivered. In *Booth v. Wonderly*, 36 N. J. L. 250, it was attempted to establish a fire insurance company in Jersey City under a charter for such a company to be located in Trenton. This was held to be a perversion of and a fraud upon the act, and to give no corporate color to the company for the protection of those who were engaged in or lent themselves to the scheme, and that they might be held personally liable as partners. In *Hill v. Beach*, 12 N. J. Eq. 31, certain persons formed a corporation under the laws of the state of New York for the purpose of working a quarry in the state of New Jersey. It was held that such corporation could not be recognized by the courts of New Jersey, and that its members were liable as partners. And in *Land Grant R'y & T. Co. v. Board of County Commissioners*, 6 Kan. 245, it was held that a corporation created by a statute of Pennsylvania, which was not permitted to do business or have an office in that state, could not be permitted to do business as a corporation in Kansas.

CASES HOLDING MEMBERS OF DEFECTIVE CORPORATION LIABLE AS PARTNERS. — But while the doctrine stated in the beginning of this note is sustained by perhaps the greater weight of authority, the contrary rule has been adopted by a large number of very respectable authorities. This rule is thus stated in Cook on Stocks and Stockholders, 2d ed., sec. 233: "A corporate creditor seeking to enforce the payment of his debt may, however, ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question. He is not estopped from so doing, since he is not repudiating a contract, but is enforcing it." This rule is sustained by the following authorities: *Garnett v. Rich-*

ardson, 35 Ark. 144; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Coleman v. Coleman*, 78 Ind. 344; *Field v. Cooks*, 16 La. Ann. 153; *Vredenburg v. Behan*, 33 La. Ann. 627; *Johnson v. Corser*, 34 Minn. 355; *Hurt v. Salisbury*, 55 Mo. 310; *Ferris v. Thaw*, 72 Mo. 446; *Martin v. Fenell*, 79 Mo. 401; *Smith v. Warden*, 86 Mo. 382; *Abbott v. Omaha Smelting etc. Co.*, 4 Neb. 416. And where the managing members of a defectively organized corporation become liable to pay and do pay its debts, their associates become liable to share the loss in proportion to the stock subscribed by each: *Richardson v. Pitts*, 71 Mo. 128. In *Johnson v. Corser*, 34 Minn. 355, although it was held that persons who entered into articles of association, intending to become incorporated, but who failed to perfect an incorporation, were individually liable upon contracts which they had authorized, they were said not to be partners with authority, implied from their relations, in each member to bind all the associates by any act within the scope of the business undertaken. In Iowa it is provided by statute that members of corporations who do not comply substantially with the requirements of the law in effecting their organization shall be individually liable: *Eisfeld v. Kenworth*, 50 Iowa, 389; *Marshall v. Harris*, 55 Iowa, 182; *Kaiser v. Lawrence S. Bank*, 56 Iowa, 104; 41 Am. Rep. 85; *Clegg v. Hamilton etc. Co.*, 61 Iowa, 121. But this provision does not apply to railroad corporations: *First Nat. Bank of Davenport v. Davies*, 43 Iowa, 424; *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643. A failure to publish any notice whatever of the organization of the corporation is such a substantial failure to comply with the requirements of the statute as will render the corporators personally liable: *Eisfeld v. Kenworth*, 50 Iowa, 389. In applying the rule of personal liability of members of defectively organized corporations, a distinction is sometimes made between corporations attempted to be organized under general laws and those created by special charters granted by the legislature. In the case of the former, a more strict compliance with the necessary steps in the process of incorporation is required: *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Omaha etc. Co.*, 4 Neb. 416; *Granby M. Co. v. Richards*, 95 Mo. 106.

WIST v. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN.

[22 OREGON, 271.]

MUTUAL BENEFIT SOCIETIES, RIGHT OF, TO CHANGE THEIR LAWS. — Mutual benefit societies have the right to alter, amend, or repeal their laws, or to enact others consistent with the purpose for which they are organized, but they cannot so exercise this right as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members.

LAW NOT CONSTRUED TO BE RETROACTIVE UNLESS CLEARLY INTENDED TO BE SO. — A new law of a mutual benefit society will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so, but such law will be construed as operating only on cases or facts that come into existence after it was passed.

IMPOSSIBLE COMPLIANCE, LAW NOT CONSTRUED TO REQUIRE. — A law of a mutual benefit society will not be construed in such a way as to render

it impossible for its members to comply with its requirements, if such a result can be avoided, especially where such a construction would operate as a complete destruction of the rights of the members, and as a repudiation by the society of its obligations.

W. D. Hare, George H. Durham, and H. G. Platt, for the appellant.

W. S. Relfe, and Ronald and Piles, for the respondent.

LORD, J. This is an appeal from a judgment of the circuit court for Multnomah County in favor of the plaintiff in an action brought to recover the sum of two thousand dollars, the amount alleged to be due on a benefit certificate which had been issued by the defendant society to Frederick Freeman for the benefit of the plaintiff. The cause was tried by stipulation before the court, without the intervention of a jury. In substance, the facts found show that at different times during his membership in the association, Frederick Freeman held two of its benefit certificates. In the first certificate which was issued to him he had designated his wife, Anna Freeman, as his beneficiary; but when she ceased to be his wife, he surrendered that certificate and took a second certificate, in which he designated the plaintiff, Philip Wist, as his beneficiary. His application upon which the certificate was issued expressly provided that "compliance on his part with all the laws, regulations, and requirements which are or may hereafter be enacted by said order is the express condition upon which I am entitled to participate in the beneficiary fund, and have and enjoy all the other benefits and privileges of said order." In July, 1888, the society changed its law relating to the classes of persons who might be designated as beneficiaries, to read as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." A circular letter of the grand recorder, issued in 1889, and a few months before Freeman's death, notified the members of his jurisdiction of the change in the law relative to beneficiaries. Shortly thereafter, Freeman died, in good standing, with all dues and assessments required of him fully paid and discharged. The plaintiff, Philip Wist, was not a member of his family, nor related to him by blood, nor dependent upon him. Freeman never changed his last beneficiary certificate after it was issued to him. There

is no claim that he did not comply with all the laws of the order, except that he did not change his beneficiary certificate by designating some one of the specified classes, which the circular letter undertook to declare that members holding such certificates must do, otherwise that they were worthless. At the date the certificate was issued to Freeman in which he had designated the plaintiff as his beneficiary, and continuously up to the date of his death, Freeman had no family nor any one related to him by blood or dependent upon him. The plaintiff was, at the time he was designated as beneficiary in the certificate, and now is, a member of the order, and Freeman, when he died, was indebted to the plaintiff in the sum of \$650. The law of the order in force long prior to the death of Freeman, as well as at present, provides: "In the portion of this fund, namely, two thousand dollars, to which the beneficiaries of a deceased member are entitled, the members themselves have no individual property right; it does not constitute a part of their estate to be administered, nor have they any right or control over the same, except the power to designate the person or persons to whom as beneficiaries the same shall be paid at the death of the member. The beneficiaries thus designated have no vested right in said sum until the death of the member gives such right, and the designation may be changed by the member in the method prescribed by the laws of the order at any time before his death." This declaration of the law of the order in respect to the rights of beneficiaries in the fund to be accumulated as not being a vested right is in accord with the general principles of the law, as declared by the courts, applicable to benefit or charitable associations. Except as restricted by the constitution and by-laws of the order, a member may exercise his power of appointment without other limit; he may designate as his beneficiary whomsoever he may choose, or he may change such beneficiary by designating another at his pleasure. The only limitation on the exercise of this valuable and important power is the organic law of the society, or the rules and regulations adopted in compliance therewith. During the lifetime of the member, his beneficiary has no vested interest in the fund to be accumulated and paid at his death which would prevent him from changing such beneficiary without his consent, or which would prevent the society from changing its rules and permitting changes of beneficiaries. The laws of the society in respect to the change of beneficiaries are for the

protection of its own interests and welfare, and as against such laws, the beneficiaries have no such vested rights or interest in the fund, during the life of the member, as will prevent the society from determining the course of such fund. In consequence of this right of a change of beneficiary by the member, all that the beneficiary can have during his life is a mere expectancy, dependent upon the will of the holder of the certificate. It is these considerations that constitute the distinction between benevolent organizations and the regular life insurance companies. This distinction has been thus expressed by Mitchell, J.: "The essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is, that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the members under the constitution and by-laws of the society. In the one case, the rights of the beneficiary are fixed and vested from the moment the policy takes effect; in the other, they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the life of the member, owing to his right of revocation, is a mere expectancy, dependent upon the will of the holder of the certificate. This expectancy is not property": *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192. So that it appears that the designation of beneficiaries by members of such associations takes effect only upon the death of such members, and that the certificate only confers upon the beneficiary a contingent expectation, liable to be divested either by the death of the beneficiary before the member or by a revocation of the appointment and a naming of another beneficiary. Upon the death of the member, the certificate takes effect so far as to vest in the beneficiary an absolute right to the benefit money: Bacon on Benefit Societies, sec. 155. Nor have the members of such societies, as such, any interest or property in the benefit fund, but simply the power to appoint some one to receive it. But while it is true that the right of the members of benefit societies in the sums agreed to be paid at death is simply the power to appoint a beneficiary, and that the constitution or charter and the by-laws are the foundation and source of such power, yet, as Mr. Bacon says, "the cases must not be understood to hold that the member of a benefit society has not a property right in the contract of membership, under which he has the power to designate a recipient of the benefit

to be paid, because of such membership, and under the contract. The right of the member in this contract is a valuable one, which the courts will at all times recognize and protect, although, strictly speaking, such member has no property interest in the benefit paid or subject of the power. The membership, which includes the right to pay the agreed consideration and to appoint a person to take the benefit, must be regarded as a species of property, and is to be distinguished from the benefit or sum paid itself in which the member has no property": Bacon on Benefit Societies, sec. 237.

At the time when Freeman designated the plaintiff as his beneficiary, and the society issued to him a certificate accordingly, it was a valid exercise of his power of appointment. There was at that date no rule or regulation of the society in conflict with his right to make such designation of his friend and fellow-member his beneficiary; and if Freeman, without revoking his appointment of the plaintiff, had died before the society had enacted the law in question limiting the appointment of beneficiaries to a certain specified class, there is no doubt or dispute as to its liability. The general rule undoubtedly is, that a designation of a beneficiary, valid at its inception, remains so; and as Freeman never revoked the appointment of the plaintiff as his beneficiary, unless the after-enacted law required Freeman to change his beneficiary so as to conform to the classes specified and become a part of his contract, and the law is valid in so far it affected his contract, the appointment of the plaintiff as his beneficiary is still valid, and the certificate took effect upon the death of Freeman, and vested in the plaintiff an absolute right to the benefit money.

The contention for the defendant is, that the law enacted by the society subsequently to the issuance of Freeman's benefit certificate, relating to the persons whom a member is entitled to designate as his beneficiary, became a part of his contract, and required him to make a designation of a beneficiary in conformity therewith, and that on his failure to do so before his death, without leaving any one capable of taking such benefit certificate, it reverted to the beneficiary fund of the supreme lodge. This contention is founded on the assumption that the law in question was retroactive, and intended to annul the appointment of beneficiaries theretofore made by members which did not belong to the classes specified in such law. The benefit certificate which was issued to Freeman was based upon his written application. By his ap-

plication, he agreed to comply with "all laws, regulations, and requirements which are or hereafter may be enacted," and in consideration of this, among other things, the defendant issued to him a beneficiary certificate. Reading the two together as constituting his contract, Freeman agreed with the society, as a part thereof, that he would comply with or be bound by its laws of future enactment as if they were already existing. But it is apprehended that contracts of this kind differ but little, if any, from contracts in other such societies, where the power is reserved to alter or amend, enact or repeal, its laws. A person who becomes a member of such an association is bound to take notice of its laws, and especially those which affect his rights and interests. These laws are elements of his contract, and determine the extent of his duties, rights, and liabilities. The right of such societies to alter, amend, or repeal laws, or to enact others consistent with the purpose for which they are organized, is well recognized. The power is essential to their continued existence and well-being, and except as restrained by the fundamental law of their organizations, may be exercised at all regular meetings. This power to amend laws, or to repeal them, is inherent and continuous for all proper objects. No member has a right to presume that the laws of his order will remain unchanged, when the promotion of its interest and welfare may require a change. "The power of the society to enact its laws," says Mr. Niblack, "is continuous, residing in all regular meetings of the society so long as it exists. Any meeting can, by a majority vote, modify or repeal the law of a previous meeting, and no meeting can bind a subsequent one by irrepealable acts or rules of procedure": Niblack on Mutual Benevolent Societies, sec. 124. So that it may be said that the power to alter or amend laws, or to repeal them, when exercised in a proper way and for the welfare of the society, is an incident of its existence, and that when so exercised, such laws are binding on its members, except when forbidden by the organic act of the society, or contrary to the laws of the land. As Elliott, J., said: "We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance; but we do affirm, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one, to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no

actionable wrong is done the members or their beneficiaries": *Supreme Lodge K. P. v. Knight*, 117 Ind. 497.

There is no power in the society to amend or enact laws which shall work any repudiation of its obligation. It resides in the society for the purposes of carrying out the objects for which it was formed; and when the power is expressly reserved in the charter, it is not construed as intended to reserve the power to avoid its contracts, or work the destruction of vested rights. So that a party's contract of insurance may be modified or varied by a subsequent law, and he be bound by it, either through the reserved power in the society to amend or enact such law, or by his contract with reference to future enactments, when it does not operate as a repudiation of its contracts, or a complete deprivation of the member's rights. As the rights of the plaintiff are derived from the contract of Freeman with the society, and as his benefit certificate, designating the plaintiff as his beneficiary, was issued before the enactment of the law limiting the persons whom a member is entitled to designate as his beneficiary, it now becomes necessary to examine this subsequent law, and ascertain whether it is applicable to benefit certificates of members which were issued before its enactment, and if so, to what extent. That law provides: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." This language is wholly prospective in its operation. It is only intended to affect the power to appoint beneficiaries and limit its exercise after the law passed. "Each member shall designate" refers, not to a past, but a future act to be performed by him,—that is, whenever a member shall exercise his power of appointment under this law, he shall designate a beneficiary of the classes enumerated. It applies as well to old members revoking a former appointment, and naming another as his beneficiary, as to new or old members who have never exercised their power to appoint a beneficiary. The law does not undertake by its terms to disturb what has been done; it does not nullify previous appointments; it only undertakes to limit to the classes specified the power to designate beneficiaries, whenever it shall be exercised by a member. It is a settled rule of construction that laws will not be interpreted to be retrospective, unless by their terms they are clearly intended to be so. They are con-

strued as operating only on cases or facts which come into existence after the laws were passed. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the legislature, to be intended not to have a retroactive operation: *Endlich on Interpretation of Statutes*, sec. 273. Rights will not be interfered with, unless there are express words to that effect. It is not enough that upon some principles of interpretation a retroactive construction could be given to the law, but the intent to make it retroactive must be so plain and demonstrable as to exclude its prospective operation. "It is not enough that general terms are employed broad enough to cover past transaction," for laws "are to be construed as prospective only, if possible": *Sedgwick on Statutory and Constitutional Law*, 161.

In fact, so great is the disfavor in which such laws are held, and so generally are they condemned by the courts, that they will not construe any law, no matter how positive in its terms, as intended to interfere with existing contracts or vested rights, unless the intention that it shall so operate is expressly declared, or is to be necessarily implied. As the law of the society is prospective in its operation, it did not affect Freeman's contract with the defendant. It did not, by its terms, nor by implication, require him to change his policy. It would only have affected his contract in the event he should have revoked the appointment of the plaintiff as his beneficiary, and then only to the extent of requiring him to appoint a beneficiary that should belong to the specified classes. There is not a word in the law requiring any member to make a change of his beneficiary; or in case of his failure to do so, as contended for by the appellant, that his benefit certificate reverted to the society. It may be conceded that Freeman was bound by all subsequent laws enacted, but as the law in question is not retroactive, it does not affect his contract. It only affects him or any other member of the society in the issue of certificates after its passage. While there is no pretense that this contract was a cover for speculation, or a wager policy, it may be conceded that the object of the law was to discourage wager policies. And it was said by counsel, unless it was held "that the society could amend its laws so as to discourage wager policies, it will be involved

in a maze of difficulties." By giving this law a prospective operation, it will greatly cut off the opportunities for such speculation in life insurance policies, and will, in a great measure, remedy the evil it was designed to abate, without denying the power of the society to amend its laws, or to enact others for the promotion of its interests and welfare.

But we may go further, and admit that the law is retroactive; that it was intended, as claimed by counsel, to affect certificates naming beneficiaries not of the classes enumerated, and requiring the holders of such certificates to designate others conformable to such law; otherwise, upon their failure to so do, that the fund payable under their certificates to such beneficiaries as do not belong to any of such classes would descend under the laws of the society or revert to it; and still we do not think such a law would be construed to affect the certificate of Freeman, or the class to which he belongs, or their beneficiaries. It is only addressed retroactively to those who can comply with its terms; for while it might have the effect to modify or vary the contracts of all such, it does not operate as a destruction of their power to appoint a beneficiary, or as a repudiation of the obligation of the society. They can comply with its terms and make the change of beneficiary and preserve the fund for his benefit. The case is different with Freeman, or those belonging to his class, who, prior to the time the law was enacted, had appointed the plaintiff as his beneficiary, and who, from the time of such appointment continuously up to his death, had no family, nor any one related to him by blood, nor dependent upon him. It was not possible for him to comply with the terms of the law by naming another beneficiary. To give the law such a construction as would include his class would operate as a complete deprivation of their rights, and an absolute repudiation by the society of its obligations. Such an injustice will never be tolerated, if by any construction it can be avoided. We are bound to construe a law, if we can, so as to make it operative without impairing the obligation of existing contracts or divesting vested rights.

We may therefore assume, for the purposes of the case, that the law was retroactive, and intended to require a change of beneficiaries, limiting them to the classes specified, and still we would be bound to construe it so as to make it operative and valid, which can only be done by confining its operation to those members who could make the change. So

averse are courts to giving a law a retroactive operation, that even where the retroactive character of the law is clearly indicated on its face, they always subject it to the most circumscribing construction that can possibly be made, consistent with the intention of the legislature. In *Hedger v. Rennaker*, 3 Met. (Ky.) 258, the court says: "It has been said by this court that retrospective statutes have ever been regarded as impolitic and unwise, as they are in general unjust and oppressive. And although such statutes have been held valid under the constitution, they have always been subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature, to be drawn from the language used."

The argument of counsel that Freeman's failure to designate a beneficiary before his death operated to vest the fund in the society assumes that he failed to do something which, under the law, he could have done, or neglected to do, and which would have prevented such result, and preserved the fund for the benefit of his beneficiary. As we have assumed only for their sake that the law is retroactive, this argument only strengthens our construction that it should be construed as only applicable to those who could make the change, and refused or neglected to do it before they should be visited with the consequences of forfeiture.

Nor does the case upon which counsel rely support their contention. I refer to the case of *Supreme Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332. There the legislature provided that a policy should be rendered void in case the holder of the certificate committed suicide. In that case, the certificate was accepted by the assured, subject to the laws of the order now in force, or which hereafter may be enacted by the supreme commandery, and the court, by Brickell, J., said: "Parties may contract in reference to laws of future enactment,—may agree to be bound and affected by them as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. . . . The statute prescribing the condition of official bonds, and of the bonds of executors, administrators, and guardians, extends the liability of the surety to the performance by the principal of such duties as are required of him by existing laws, or by any law passed subsequent to the execution of the bond. There is no injustice

in the statute, — nothing retrospective in its operation.” But the court, as if having in mind the case at bar, added: “While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, — terms or conditions reasonably calculated to promote the general good of the membership, — and may be valid and binding, it does not follow that a law operating a destruction of a certificate or a deprivation of all rights under it would be of any force”: *Korn v. Mutual Assur. Soc.*, 6 Cranch, 192.

In our view of the case, therefore, we do not think that the law in question is retroactive, or that it affects the certificate of Freeman, or the rights of his beneficiary under it, or if it be considered to have a retroactive operation, that it applies to certificates held by those members who cannot comply with its terms, and whom to construe it to include would operate as a complete destruction of their certificate and their rights under it, and as a repudiation by the society of its obligation.

It follows that the judgment must be affirmed.

STATUTES — INTERPRETATION — RETROSPECTIVE LAWS. — A statute shall not be interpreted so as to operate retrospectively, unless the language is so clear as to preclude all question as to the intent of the legislature: *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94, and note with cases collected: *Oriental Bank v. Fressé*, 18 Me. 109; 36 Am. Dec. 701, and note.

McBEE v. McBEE.

[22 OREGON, 329.]

DIVORCE, HABITUAL GROSS DRUNKENNESS AS GROUND FOR. — Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence.

J. C. Fullerton, for the appellant.

William R. Willis, for the respondent.

LORD, J. This is a suit in equity brought by the plaintiff against the defendant, her husband, to obtain a divorce. The only cause for divorce alleged in her complaint is habitual gross drunkenness contracted since the marriage and continuing for one year prior to the commencement of this suit. There are other allegations as to the real property owned by the defendant, but to which further reference is unnecessary. The

answer of the defendant denies the allegation of habitual gross drunkenness, and all other allegations in reference thereto. The cause was referred to a referee, the testimony reduced to writing and reported to the court, whereupon the court made a decree granting a divorce to the plaintiff, and awarding her one third of the real property of the defendant.

The only question in this case is, whether the defendant is an habitual gross drunkard. Our statute provides as a cause for divorce: "Habitual gross drunkenness contracted since marriage and continuing for one year prior to the commencement of the suit": Hill's Code, sec. 495, subd. 4. The testimony of the plaintiff is to the effect that the defendant has drank to excess and intoxication latterly, when he came to town, which would average twice a month. She says: "He might not get so drunk every time he came to town, but pretty nigh it"; but "he sobered up quick; hardly ever brought liquor home with him, but sometimes he did; during the hop-picking time they had liquor there." When asked whether he had been under the influence of liquor to such an extent for the last two or three years as to disqualify him in any way to perform the work about the farm, she answered: "No; it was mostly when he came to town that he got intoxicated." There is other evidence corroborative of these statements, and other evidence for the defendant in conflict with it. It appears that since their marriage in 1880 they have lived upon his farm, which is some four or five miles from Roseburg; that she had four children by a former marriage, whom he has supported, and that there are now two other children, the fruit of the present marriage. The town of Roseburg is the only place in the vicinity of his farm where liquor is kept for sale. While the plaintiff puts the average of his visits to Roseburg at twice a month, the testimony shows that sometimes he did not go there for an interval of a month, sometimes oftener, or once a week; but these visits were not made specially for the purpose of procuring liquor, or of drinking to excess or intoxication. When he had any business which called him to Roseburg, he would generally indulge in intoxicating drinks, and sometimes to excess, and on one occasion he got so drunk as to fall from his wagon, although he gives another version to the affair. There is some testimony of his neighbors to the effect that he is not a drunkard, and does not have the reputation of being one in the community in which he lives. Mr. Josephson and Mr. Simon Caro, both merchants of Roseburg, testify that

they have known him for twelve to fifteen years, and that they have traded and done business with him, and met him nearly every time he came to town; that they had never seen him drunk; and that if he had been an habitual drunkard, or had had such a reputation, they would have observed and known it. This testimony is hardly to be classed as merely negative. It is not simply to the effect that they had not seen him in a state of intoxication, but it goes farther, and shows that with their opportunities for observing his habits, he could not have got drunk every time he came to town, or been so habituated or confirmed in the habit, without their knowing it.

What constitutes habitual gross drunkenness sufficient to warrant a divorce has not been defined in any adjudicated case in this state. In other statutes, the language is "habitual drunkenness," or "habitual intemperance," but our statute adds the word "gross," as if something more were intended or denoted. Bouvier defines an habitual drunkard to be a "person given to inebriety, or the excessive use of intoxicating drinks, who has lost the power or will, by frequent indulgence, to control his appetite for it." "Habitual drunkenness," said Harrison, J., "or the degree or the course of intemperance that amounts to it, cannot be exactly defined. We may, however, say, in general terms, that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk, and he may be so addicted, though he may not oftener be drunk than sober, and he may be sober for weeks": *Brown v. Brown*, 38 Ark. 328. "Occasional acts of drunkenness do not make one an habitual drunkard. Nor is it necessary that he should be continually in an intoxicated state. A man may be an habitual drunkard and yet be sober for days and weeks together. The rule is, Has he a fixed habit of drunkenness?" *Ludwick v. Commonwealth*, 18 Pa. St. 172. "He is an habitual drunkard," says the court in *Commonwealth v. Whitney*, 5 Gray, 85, "whose habit is to get drunk; whose inebriety has become habitual." Poland, J., said: "The fair definition of 'habitual drunkard,' as used in the statute, we suppose to be, 'one who is in the habit of getting drunk, or who commonly or frequently is drunk'; and we do not suppose it necessary, to satisfy those terms, that a man should be constantly or universally drunk": *State v. Pratt*, 34 Vt. 323. It is held in *Magahay v. Magahay*, 35 Mich. 210, that one who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented

by his being in the vicinity where liquor is sold, is an habitual drunkard within the meaning of the divorce law. In *Walton v. Walton*, 34 Kan. 195, it is said that a man who drinks to excess may be an habitual drunkard within the meaning of the divorce laws, although there are intervals when he refrains entirely from the use of intoxicating drinks. "But," the court adds, "before he can be regarded as an habitual drunkard, it must appear that he drinks to excess so frequently as to become a fixed practice or habit within him." In *Murphy v. People*, 90 Ill. 59, it was held that a person who is in the habit of getting intoxicated is one who has the involuntary tendency to become intoxicated, which is acquired by frequent repetition. "The charge of habitual intemperance," says Harrison, J., "evidently can only refer to a persistent habit of becoming intoxicated from the use of strong drinks, thus rendering his presence in the marital relation disgusting and intolerable": *Burns v. Burns*, 13 Fla. 376. And Watkins, J., defined it thus: "It means the custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual abuse of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous, or even of daily occurrence": *Mack v. Handy*, 39 La. Ann. 497.

From these definitions, there must be frequent and regular recurrence of excessive indulgence in intoxicating drinks to constitute an habitual drunkard. It is not necessary that he should drink liquors to excess, and become intoxicated every day, or even every week, but there must be such frequent repetition of excessive indulgence as to engender a fixed habit of drunkenness. Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. The man is reduced to that pitiable condition in which "he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by the indulgence that resistance is impossible." There is generated in him, by frequent and excessive indulgence, a fixed habit of drunkenness which he is liable to exhibit at any time when the opportunity is afforded. He is an habitual drunkard because he is commonly or frequently in the habit of getting drunk, although he may not

always be so. When a man has reached such a state of demoralization that his inebriety has become habitual, its effect upon his character and conduct is to disqualify him from properly attending to his business, and if he be married, to render his presence in the marriage relation disgusting and intolerable, especially if he be an "habitual gross drunkard," as declared by our statute. "The reason why the law makes habitual drunkenness a ground for divorce is not alone because it disqualifies the husband or wife from attending to business, but in part, if not mainly, because it renders the person addicted thereto unfit for the duties of the marital relation, and disqualifies such person from properly rearing and caring for the children born of the marriage": *Richards v. Richards*, 19 Brad. 469.

In view of these considerations, it does not seem to us that the testimony would justify us in declaring that the defendant is so addicted to the habit of intoxication as to be an habitual drunkard. In all the years there are only a few occasions, according to the version of the testimony against him, when he was grossly drunk, and when his conduct was improper and unbecoming. The testimony does not indicate the confirmed habit of drinking to excess; he only drank when he happened to come to town, which was generally on business, and then not always to excess, and sometimes, the evidence indicates, not at all; or if so, not indicated by his conduct or demeanor. He seldom carried liquor to his home, and, with the exceptional instances stated, was a sober man in his family and about his home. While we would feel no hesitation in dissolving the marriage contract when one of the parties was addicted to "habitual gross drunkenness," we ought not to lend our aid to effect a separation, especially when there is issue of the marriage, unless fully satisfied by the testimony, viewed as a whole, that the defendant was an habitual gross drunkard.

In view of these considerations, we think the decree must be reversed, the defendant paying all costs and disbursements.

MARRIAGE AND DIVORCE — HABITUAL DRUNKENNESS. — The words "habitual drunkenness," as used in the statute, mean that state or condition which follows from taking into the body, by drinking, excessive quantities of intoxicating liquor: *Younge v. Younge*, 130 Ill. 230; 17 Am. St. Rep. 313. Occasional intoxication is not habitual intoxication: *Meathe v. Meathe*, 83 Mich. 150. If one is in the habit of drinking to excess in such a degree as to render him incapable of attending to business during the principal portion of the time devoted to business, it amounts to habitual intemperance: *Matons v.*

Mahone, 19 Cal. 626; 81 Am. Dec. 91, and note. Habitual drunkenness, as a ground for divorce, must be shown to have been indulged in for one year previous to the filing of the complaint: *Reynolds v. Reynolds*, 44 Minn. 132. See also *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, for a definition of an "habitual drunkard."

KELLOGG & Co. v. MILLER.

[21 OREGON, 406.]

INSOLVENCY — SECURED CREDITOR'S ENTIRE CLAIM PROVABLE AGAINST INSOLVENT'S ESTATE. — A creditor whose claim is secured by mortgage may prove the entire claim against the estate of an insolvent debtor, and is entitled to a dividend on the face of such claim, without regard to the value of the mortgaged property.

Willard Crawford and Sanderson Reed, for the appellant.

Francis Fitch and C. J. MacDougall, for the respondents.

BEAN, J. On July 29, 1890, C. J. Kurth and John W. Miller, partners, doing business under the firm name of Kurth and Miller, being insolvent, made a general assignment of all their property to appellant, D. H. Miller, for the benefit of their creditors. At the time of the assignment, Kurth and Miller were indebted to respondents Charles P. Kellogg & Co. in the sum of \$1,448.90 on a promissory note for goods, wares, and merchandise, which indebtedness was secured by a mortgage upon certain real property of the probable value of \$800. Within the sixty days allowed by law, Kellogg & Co. presented to the assignee their claim, duly verified, for \$1,448.90, being the full amount thereof; and on September 13, 1891, the assignee having converted into money all the property of the estate of Kurth and Miller, except the mortgaged premises, the circuit court of Jackson County, in a proper proceeding, ordered and adjudged that the assignee pay to all the creditors of the estate, including Kellogg & Co., *pro rata*, according to the amount of their respective claims, from which order this appeal is taken. The only point raised by and to be decided on this appeal is, whether a creditor of an estate in the hands of an assignee under the general assignment law, whose claim is secured or partially secured by a mortgage on real property, is entitled to a dividend on the face of such claim without regard to the value of the mortgaged property; or whether such creditor is compelled to rely upon his mortgage first, and is entitled to a dividend only upon the balance of his claim,

if any, after his security is exhausted. There are some conflicting decisions upon this question in the courts of this country and in England. -

The law governing the administration of estates in bankruptcy, which is, that creditors so secured shall have dividends only on the residue of their claims after converting and applying the security, or after deducting its appraised value, has been applied sometimes in the settlement of an insolvent estate after the death of the debtor, or under his assignment; but there seems to be no warrant for any such application of the bankruptcy doctrine. The rule in bankruptcy proceeds, it is generally said, upon the express provisions of the statute requiring the creditor to give up his security, in order to be entitled to prove his whole debt, or if he retain it, only proving for the balance of the debt after deducting the value of the security held, and hence is not controlling upon a court administering in equity upon the estate of insolvent debtors. By the great preponderance of authority, the creditor has a right, in the absence of statute, to prove and have dividends upon his entire debt, irrespective of the collateral security: *Jones on Pledges*, sec. 587; 1 *Story's Eq. Jur.*, sec. 564 b; *People v. Remington*, 121 N. Y. 328; *Allen v. Danielson*, 15 R. I. 481; overruling *Petition of Knowles*, 13 R. I. 90; *In re Bates*, 118 Ill. 524; 59 Am. Rep. 383; *Paddock v. Bates*, 19 Ill. App. 470; *West v. Bank of Rutland*, 19 Vt. 403; *Walker v. Baxter*, 26 Vt. 710; *Citizens' Bank v. Patterson*, 78 Ky. 291; *Brown v. Merchants' Bank*, 79 N. C. 244; *Moses v. Ranlet*, 2 N. H. 488; *Morris v. Olwine*, 22 Pa. St. 441; *Keim's Appeal*, 27 Pa. St. 42; *Graeff's Appeal*, 79 Pa. St. 146; *Mason v. Bogg*, 2 Mylne & C. 443; *Kellock's Case*, L. R. 3 Ch. 769.

These cases proceed upon the theory that by the contract between the debtor and creditor the creditor secures a personal right against the debtor, and also a right to proceed against the security in case the debt is not paid. The debt or personal right is the principal thing, the security being regarded as something collateral, which does not reduce the debt, but only secures the creditor *pro tanto* in case the debt is not paid in full by the debtor or his estate. In the absence of the intervention of positive or statutory law, this contract is not varied or changed by the insolvency of the debtor or his assignment, and the courts will not interfere with the rights and remedies which a creditor secures to himself by contract. Hence he may prove against the estate for the entire amount

due him, and receive his dividend accordingly. And this comports with the provisions of the assignment law of this state, which requires the court to "order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims" (Code, sec. 3180), — not in proportion to their claims less the value of any security they may hold.

Counsel for appellant invoke the well-recognized equitable principle that if a creditor have two funds out of which he may make his debt, he will be required to resort to that fund upon which another creditor has no lien. While this is true as a general rule, it must be understood with some qualification, and "is never applied, except when it can be done without injustice to the creditor or other party in interest having a title to the double fund": Story's Eq. Jur., secs. 560, 633. "In its application, the paramount encumbrancer must not be delayed or inconvenienced in the collection of his debt; for it would be unreasonable that he should suffer because some one else has taken imperfect security": 3 Pomeroy's Eq. Jur., sec. 1414; *Evertson v. Booth*, 19 Johns. 486. It is therefore thought this principle has no application to a case like the one at bar: *People v. Remington*, 121 N. Y. 328; *Paddock v. Bates*, 19 Ill. App. 470.

We are aware a different rule from the one here contended for is announced in *Amory v. Francis*, 16 Mass. 308, *Farnum v. Boutelle*, 13 Met. 159, and *Wurtz v. Hart*, 13 Iowa, 515; but, with the court of appeals of New York, we think that, "whether we look at this question in the light of reason or of the adjudged cases, the rule which best commends itself to our judgment is that which leaves the contractual relations of the debtor and his creditor unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement. The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate": *People v. Remington*, 121 N. Y. 328.

The judgment appealed from is therefore affirmed.

INSOLVENCY — SECURED CREDITOR'S CLAIM AGAINST INSOLVENT'S ESTATE.
— A creditor, if he does not know that his debtor has determined to make an assignment, may take from him a mortgage for his debt in good faith, and

enforce it, and the debtor's subsequent assignment will not affect the security: *Home Nat. Bank v. Sanchez*, 131 Ill. 330. Creditors are entitled to prove their claims against an insolvent estate without regard to the securities they may hold, and receive dividends for the amount they prove: *People v. Remington*, 121 N. Y. 328. When the maker and indorser of a promissory note each made assignments for the benefit of creditors, it was held that the holder of the note was entitled to a dividend upon the whole amount of the note from each estate: *Miller's Estate*, 82 Pa. St. 113; 22 Am. Rep. 754. Money, notes, etc., left by an insolvent debtor contemplating suicide, with a third person to satisfy the claims of his creditors, if delivered by that person to a creditor, after the debtor's death, may be retained by him as against other creditors, so far as necessary to satisfy his claims: *Woodbury v. Bowman*, 14 Me. 154; 31 Am. Dec. 40.

STAYER v. LOCKE.

[22 OREGON, 512.]

GUARANTOR BOUND ONLY BY PRECISE TERMS OF CONTRACT GUARANTEED BY HIM. — A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed.

THE plaintiff's predecessors in business, to whose rights it has succeeded, appointed one W. F. Locke their agent at Huntington, Oregon, for the sale of goods and the transaction of certain specified business. At the time of such appointment, the parties executed a written agreement, by the sixth stipulation of which said W. F. Locke agreed "to guarantee the payment at maturity, or any time thereafter when demanded, of all notes and renewals of notes taken for goods sold under this contract, indorse said notes as soon as taken, waiving demand, protest, and notice of non-payment. Failure to indorse by said agent shall not affect above guaranty of payment." Appended to the contract was the following: —

"GUARANTY.

"For value received, and in further consideration of one dollar to him in hand paid by said Stayer and Walker, the undersigned do hereby guarantee the faithful and full performance by the agent named in the foregoing of all the agreements and engagements therein entered into by said agent. Witness his hand and seal this day and date within written.

"W. F. LOCKE. [SEAL]

"J. S. LOCKE. [SEAL]

"In presence of —

"TINA LOCKE.

"T. T. WOOD."

The complaint alleged that said W. F. Locke, while acting as such agent under said contract, and in accordance with its provisions, sold certain goods furnished by Staver and Walker to various persons, and took from them sundry notes. Presentment was alleged of each of said notes to the several makers when the same became due, and that payment was demanded and refused. It also alleged that plaintiff used much diligence in trying to collect said notes, both from the makers and from said agent, W. F. Locke; that the defendant, J. S. Locke, guarantor, had been frequently duly notified of the failure and refusal of said W. F. Locke to pay said notes, or any of them, and of his failure thereby to faithfully fulfill the said agreements and engagements of his agency contract. It alleged further, that about the date of said several notes, W. F. Locke indorsed each of them as follows:—

“In consideration of the commission to be paid upon the within sale as per terms of contract, I hereby guarantee the payment of the within note, waiving demand, notice, and protest.
WM. F. LOCKE.”

Demand of payment of said notes upon said J. S. Locke and his refusal are alleged. It alleges that said W. F. Locke is wholly insolvent, and that in furnishing said goods, Staver and Walker relied wholly upon J. S. Locke's guaranty. J. S. Locke filed a separate demurrer to the complaint, which was sustained. The plaintiff declining to plead further, final judgment was rendered in favor of the defendant, J. S. Locke, from which the plaintiff appealed. Other facts are stated in the opinion.

W. F. Butcher, for the appellant.

J. L. Rand, for the respondent.

STRAHAN, C. J. The liability of J. S. Locke, the respondent, depends upon the terms of his guaranty. As will be seen from the statement, he guaranteed the faithful performance by the agent named in the foregoing contract of all agreements and engagements therein entered into by the said agent. The only breach of the agreement on the part of W. F. Locke, by which it is claimed J. S. Locke became liable, is, that said W. F. Locke failed to pay said notes when they became due, or on demand. The obligation which W. F. Locke assumed in this particular is contained in the sixth specification of the contract, and is contained in the statement. The duties and

obligations assumed by W. F. Locke by the agreement are enumerated with great particularity, and are contained in specifications numbered from 1 to 7, inclusive. The second specification recites that the said W. F. Locke agrees to do all the business, etc.; 3. To make all notes, etc.; 4. To settle for all goods, etc.; 5. To draw all notes, etc.; 6. To guarantee the payment at maturity, or any time thereafter when demanded, of all notes and renewals of notes taken for goods sold under this contract; indorse said notes as soon as taken, waiving demand, protest, and notice of non-payment. If these words in themselves import a guaranty by W. F. Locke of the payment of all notes taken by him for goods sold, then there is much force in the appellant's contention; on the other hand, if they only bound W. F. Locke to indorse the notes in the manner therein specified, then there is no reason whatever to claim that the defendant is liable on his guaranty, for the reason the complaint alleges that W. F. Locke duly indorsed them.

The phraseology used is obscure, and its meaning is not obvious, and the inferences to be drawn from different parts of the agreement are so contradictory and unsatisfactory that we fail to derive any aid from that source. For instance, the fourth clause obliges the agent to settle for all goods sold, either by cash or notes, at the time of delivery, said agent to be held liable for any loss or damage caused by a deviation from this stipulation. It may be suggested that if he was liable at all events, or as guarantor for all goods sold, why does this clause only hold him liable for any loss or damage caused by a deviation from this stipulation? Besides, if he was liable as guarantor in every case when the purchaser did not pay, why indorse the notes at all? Stayer and Walker, under that construction, held a single guaranty covering all defaults, and the indorsements of the notes added nothing to the liability of the agent. Then, on the other hand, it is declared in the latter part of clause 6 that failure to indorse by said agent shall not affect above guaranty of payments. This language seems to assume that aside from the indorsements provided for, the contract contained a guaranty of payment. What W. F. Locke agreed to do was to guarantee the payment at maturity, etc.; and the subsequent language of clause 6 seems to indicate in what manner the guaranty was to be made, namely, by indorsing said notes as soon as taken, waiving demand, protest, notice of non-payment, etc.; all of which

the pleadings admit he fully performed. The plaintiff's contention seems somewhat forced, and the construction contended for strained and unnatural. The intention of the parties to a contract of guaranty, when ascertained, is to prevail, as in other contracts; still, it is said that it is now too well settled to admit of doubt, that a guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed; that he is in this respect a favorite of the law, and that a claim against him is *strictissimi juris*: *Kingsbury v. Westfall*, 61 N. Y. 356. And in determining the liability of a surety or a guarantor, it must be remembered that he is a favorite of the law, and has the right to stand upon the strict terms of his obligation, when such terms are ascertained: *People v. Chalmers*, 60 N. Y. 154; *State v. Churchill*, 48 Ark. 426.

J. S. Locke's liability depends entirely upon the construction we have given in article 6 of the agreement. He guaranteed the faithful and full performance by the agent named in the foregoing of all the agreements and engagements therein. If W. F. Locke guaranteed the notes by making the proper indorsement thereon, then he performed his agreement in that respect, and the defendant would not be liable. J. S. Locke did not guarantee that the agent would pay the notes which he might take from purchasers of the plaintiff's goods, but only that such agent should guarantee the payment. There is no breach of the agreement shown, to charge the respondent. The court below did not, therefore, err in sustaining the demurrer to the complaint.

The judgment appealed from must be affirmed.

GUARANTY — CONSTRUCTION OF CONTRACT OF: See note to *Huff v. Stife*, 13 Am. St. Rep. 500; note to *Gates v. McKee*, 64 Am. Dec. 549. A guarantor may specify in a written order which he gives the terms upon which he will be bound: *Wadsworth v. Allen*, 8 Gratt. 174; 56 Am. Dec. 137. He who seeks the benefit of a guaranty must show a strict compliance with its terms: *Fellows v. Prentiss*, 3 Denio, 512; 45 Am. Dec. 484, and note. Guaranties must be construed so as to give effect to the intention of the parties: *Gardner v. Watson*, 76 Tex. 25.

BOWEN v. CLARKE.

[22 OREGON, 506.]

INSTRUCTIONS TO JURY ON ABSTRACT PROPOSITIONS OF LAW IMPROPER. —

It is not proper to instruct the jury upon abstract propositions of law, however correct in themselves they may be.

LANDLORD NOT BOUND TO RELET PREMISES WRONGFULLY ABANDONED BY

TENANT. — When a tenant wrongfully abandons the demised premises, the land lord may re-enter for the purpose of caring for them, without waiving his rights under the lease. He is not bound to relet the premises, but if he does relet them, the measure of his damages for the breach of the old lease will be the difference between the rent under it and the rent he receives under the new lease.

THE complaint alleged that on June 10, 1890, the defendants leased from the plaintiff a building for the term of three years, at the monthly rent of one hundred dollars, payable on the first day of each month during the continuance of the lease; that defendants entered into possession and continued to occupy the premises under the lease, and paid the rent therefor, until the 31st of January, 1891, at which time they abandoned the premises, and thereafter refused to pay the rent, or any part thereof, agreed in said lease to be paid. This action was brought to recover the rent for said premises for the months of February, March, and April, 1891. The answer admitted the leasing and the non-payment of the rent, but alleged that on the thirty-first day of January, 1891, said lease was canceled and surrendered, and on said day the plaintiff entered into and took the actual possession of said premises, and received the keys thereof; that by and through the mutual understanding and agreement of the respective parties thereto, said lease was canceled, surrendered, void, and of no effect; and that in pursuance of said agreement the plaintiff has been at all times since and now is in the actual and exclusive possession of said premises, and at all of said times has been offering the same to rent to other parties. The reply denied the new matter contained in the answer. The jury returned a verdict of one dollar for the plaintiff, and from the judgment entered thereon he appealed. Other facts are stated in the opinion.

Williams and Smith, for the appellant.

Hyde, Johns, and Olmstead, for the respondents.

STRAHAN, C. J. There was but one witness introduced upon the trial, and that was the plaintiff. The lease was also read.

The court gave the jury the following instructions: "If you find from the evidence in this action that the defendants or their agents delivered the keys to the plaintiff, and surrendered up the premises to the plaintiff, with the understanding and agreement that the lease should become terminated, and the plaintiff took possession of the premises with that understanding and agreement, then I instruct you that you must find for the defendants. But you must find, gentlemen of the jury, from the evidence that these keys were surrendered up by the defendants themselves, or by some one authorized by them to act as their agents." This instruction was excepted to, and presents the first question on this appeal. The appellant's point of exception is, not that this instruction is not good law, but that it is wholly inapplicable to the facts appearing in evidence. The appellant concedes that as an abstract proposition of law the instruction is sound, but his contention is, that there was no evidence whatever before the jury upon which such an instruction could be based. On the contrary, the only evidence before the jury upon the question of the intent with which the plaintiff received the keys is just the reverse of what is assumed by the instruction.

The same is true as to the alleged understanding and agreement that the lease should become terminated, as well as the surrender of the premises to the plaintiff. The defendants removed from said premises without the plaintiff's knowledge or consent, and then sent him the keys by one Pringle, which the plaintiff received for the purpose of caring for the building, at the same time informing Pringle that he would hold the defendants for the rent, and the keys subject to their order. There was therefore no fact in evidence before the jury upon which this instruction could have been predicated.

We have several times held that abstract propositions of law, however correct in themselves, are necessarily misleading and mischievous. They tend to draw the minds of the jurors away from the real facts in the case to something which they assume to exist, but which cannot be found in the record: *Morris v. Perkins*, 6 Or. 350; *Hayden v. Long*, 8 Or. 244; *Marz v. Schwartz*, 14 Or. 177; *Breon v. Hinkle*, 14 Or. 494; *Glenn v. Savage*, 14 Or. 567; *Langford v. Jones*, 18 Or. 307; *Woodward v. Oregon R'y & Nav. Co.*, 18 Or. 289; *Bailey v. Davis*, 19 Or. 217; *Rowland v. McCown*, 20 Or. 538; *Knahtla v. Oregon S. L. R. R. Co.*, 21 Or. 136.

The court also gave the jury the following instruction, to

which an exception was duly taken: "If the plaintiff did take possession of said premises, and has tried to rent the same to other parties, I instruct you that this is evidence that tends to show that the lease was surrendered up and canceled by the consent of the parties thereto, but of itself is not sufficient to constitute a surrender." What the court meant by this instruction, when considered in the light of the evidence, is not quite apparent. It appeared upon the trial that plaintiff received the keys from Pringle, and entered into the possession of said property for the purpose of caring for it; but it is going too far to say that this is evidence that tends to show that the lease was surrendered up and canceled by the consent of the parties thereto. It is but a circumstance, and taken in connection with other facts which could readily be imagined, might be entirely controlling on the question of surrender; but the other facts nowhere appeared, which is probably the reason the court added that the fact mentioned in the instruction would not of itself be sufficient to constitute a surrender.

In a civil action, where evidence is submitted which tends to prove a fact in controversy, a jury may find the fact from such evidence, if they think proper, and the court cannot deny them that right. It is therefore manifest that the court sought to attach entirely too much importance to the delivery of the keys of the building to the plaintiff and his attempt to relet the premises. The legal effect of those acts depended very much with what intent the keys were delivered to the plaintiff, and with what intent and for what purpose he accepted the same. The defendants had abandoned the premises at that time, and no doubt were anxious to surrender the same, but they could not, without the plaintiff's consent, relieve themselves from liability under the lease; and the plaintiff's words at the time he received the keys are the only evidence in the case on that subject. He then expressly informed Mr. Pringle that he would not release the defendants, and that he would hold them for the rent, and that the keys were subject to their order.

The court gave this instruction to the jury: "If the lease was surrendered up and canceled by the parties with their mutual consent, then the plaintiff cannot recover in this action for any rent after such cancellation." The giving of this instruction was error, for the same reasons presented in discussing the first exception. As an abstract proposition of law, it is

correct, but there was no evidence whatever before the jury that would authorize it.

The court also gave this instruction: "I instruct you that it is not necessary that the lease should actually be surrendered up and canceled, but you may find this from the acts and the intentions of the parties, and their conduct in relation to the same." This instruction was misleading, for the same reasons as the first and third, and also for another reason: it virtually invited the jury to enter the field of speculation, and to conjecture, if they could, some cause for annulling plaintiff's lease. There were no acts of the parties in evidence from which said conclusion could have been drawn, and there was no way that the intentions of the parties could be known, other than from what they did and said. Besides, the intentions of the party on one side would not have been enough. To constitute a surrender, both must have concurred in the act.

The court further instructed the jury as follows: "I instruct you that if you find from the evidence that the plaintiff did take possession and receive the keys, it was then the duty of the plaintiff to rent the building, if he had the opportunity to do so, and receive the rent and give the defendants credit for the amount received." Upon the argument in this court, counsel for respondent was unable to cite a single authority to sustain this instruction: and it is not apparent to us, under the facts in the case, how such a duty on the part of the landlord could originate. So far as appears, the defendants abandoned said premises wrongfully and without cause. The plaintiff, as a prudent landlord, was not bound to refuse to care for his premises, nor was he bound to accept another as his tenant who was not satisfactory to him. The defendants had every opportunity of thus protecting themselves before they abandoned the house, had they thought proper. They could not by their own wrong in abandoning the premises impose that duty on the plaintiff; or if he refused to accept the keys, to take the chances of the serious deterioration of the property by reason of its being neglected. He was the owner, and had the right to accept the keys for the purpose of caring for his property, without waiving his rights under the lease.

The court also gave to the jury this instruction: "I instruct you that if you should find that the lease was not terminated or canceled, and the plaintiff took possession of the premises

and received the keys, and that responsible parties made him a *bona fide* offer to rent the building, and that plaintiff refused to rent the building, then the plaintiff can only recover the difference between the rent stipulated in the lease and the amount for which the premises could have been rented." Much of what was said in relation to instruction 5 is also applicable here. If the plaintiff had accepted a new tenant, as the authorities seem to hold he might have done without effecting a surrender of the premises, he was not bound to do so: *Respini v. Porta*, 89 Cal. 464; 23 Am. St. Rep. 488. Yet if he did relet them, the measure of his recovery would be the difference between the two sums: *Winant v. Hines*, 14 Daly, 187. But there was manifestly no legal duty resting on the plaintiff to relet the premises. He had the defendants as his tenants under a valid lease, and we know of no law that would enable them, without the consent of the plaintiff, to repudiate their contract, and to exact a release from the plaintiff, and compel him to accept another tenant in their stead.

For the reasons indicated in this opinion, the judgment must be reversed and a new trial ordered.

LANDLORD AND TENANT — WRONGFUL ABANDONMENT BY TENANT — LANDLORD'S REMEDY. — When the administrator of a deceased lessee notifies his landlord of his intention to abandon the leased premises, but the lessor objects, and notifies him that he will relet the premises for the best rent he can get, the lease is not terminated, and the lessor may recover from the administrator the deficit: *Alsop v. Banks*, 68 Miss. 664; 24 Am. St. Rep. 294; *Respini v. Porta*, 89 Cal. 464; 23 Am. St. Rep. 488, and note. A tenant cannot abandon his title, and notwithstanding he has gone out, unless the surrender is accepted by the landlord, his right of possession remains during the term: *Welcome v. Hess*, 90 Cal. 507; 25 Am. St. Rep. 145, and note.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

MORRILL v. HOYT.

[83 TEXAS, 59.]

ATTORNEY FEES, STIPULATED TO BE PAID IF LEGAL PROCEEDINGS INSTITUTED, RECOVERABLE WHEN. — The presentation of a claim properly proved against the estate of a lunatic in the hands of a guardian constitutes the institution of legal proceedings for its collection, and entitles the holder of a note so presented to recover an attorney's fees stipulated therein to be paid "if legal proceedings be instituted."

Dickson and Maroney, for the plaintiff in error.

No brief for the defendant in error.

TARLTON, J., Section B. February 2, 1885, one J. H. Davis executed a note for the sum of thirteen hundred dollars, payable to the order of plaintiff in error, secured by a deed in trust on certain real estate, and due two years after date, with interest from date until paid at the rate of twelve per cent per annum.

The interest was payable annually, and the note stipulated that "upon default in the payment of the interest for any year, the principal of this note is at once to become due and payable." The note further provided for "ten per cent additional as attorney fees if legal proceedings be instituted on this note to collect the amount due by it." Default was made in the payment of the interest due February 2, 1886; and thereafter, on March 30, 1886, J. H. Davis was adjudged to be a person of unsound mind, and B. A. Hoyt, defendant in error, became the legally appointed and qualified guardian of the lunatic. The note was placed in the hands of attorneys for collection, and by them was, on December 4, 1886, pre-

sented to the guardian, properly proved up by affidavit made by one of the attorneys, including the claim for ten per cent attorney fees. The claim was, on December 7, 1886, approved by the guardian, except as to the demand for ten cent attorney fees, which was rejected. Mrs. M. A. Morrill therefore, on December 8, 1886, instituted this suit against the guardian to recover the entire amount of the note, principal, interest, and attorney fees. The defendant answered, admitting the facts stated, but denied any obligation for attorney fees, on the ground that legal proceedings had not been instituted for the collection of the claim. April 14, 1887, after the bringing of this suit, the guardian paid on the principal and interest of the note the sum of \$1,640, duly indorsed as a credit. March 19, 1888, the court rendered judgment for the plaintiff for the sum of \$20.21, the balance of the principal and interest due on the note after deducting the payment made. The court further adjudged that plaintiff should pay the costs, holding that the proving up and the presenting of the plaintiff's claim by her attorneys did not constitute the institution of legal proceedings.

By virtue of a writ of error the judgment is before us for revision.

Before the presentation of the claim, default had been made in the payment of the annual interest due February 2, 1886. The note had therefore, according to its terms, matured: *Harrison Machine Works v. Reigor*, 64 Tex. 89. The sole question for our consideration is, Did the steps taken by the plaintiff, viz., the putting of the claim past due against the estate of the lunatic into the hands of an attorney, who properly proved it up and presented it for allowance to the guardian of the estate, constitute the institution of legal proceedings for the collection of the amount due on the claim?

We have been anticipated by this court in the decision of this question in the case of *Simmons v. Terrell*, 75 Tex. 275. It was there held, in a case quite similar to the present in the facts presented, that the presentation of a claim of like character to an administrator, its rejection by him as to the demand for attorney fees, and the subsequent institution of a suit in the district court on the entire demand, entitled the creditor to the recovery of the ten per cent attorney fees provided for in the note. It had been previously held, in effect, that the authentication of a claim against the estate of a deceased person, and the presentation thereof for allowance and

approval, constitute the institution of legal proceedings for its collection: *Cotton v. Jones*, 37 Tex. 36.

We therefore find that the judgment of the lower court is erroneous. The plaintiff was entitled to recover ten per cent of the amount, principal and interest, due on the note April 14, 1887, the date of the payment of \$1,640, and in addition, ten per cent of the balance, principal and interest, due at the date of the trial, March 19, 1888, after deducting the payment, the entire amount so adjudged to bear interest at the rate of twelve per cent per annum from March 19, 1888, with foreclosure as prayed for in the petition.

We recommend that the judgment be reversed, and here rendered in accordance with this opinion.

RECOVERY OF ATTORNEY'S FEES. — The cases in which attorney's fees are recoverable as an element of damages are discussed in the note to *Winkler v. Roeder*, 8 Am. St. Rep. 158.

STIPULATION IN PROMISSORY NOTE TO PAY ATTORNEY'S FEES, EFFECT OF: See *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433; *Montgomery v. Cross-thwait*, 90 Ala. 553; 24 Am. St. Rep. 832; *Altman v. Rittershofer*, 68 Mich. 287; 13 Am. St. Rep. 341; *First Nat. Bank v. Babcock*, 94 Cal. 96; 28 Am. St. Rep. 94; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461.

HERMAN v. GUNTER.

[83 TEXAS, 66.]

NEGOTIABLE INSTRUMENT — IMPEACHING CONSIDERATION — BURDEN OF PROOF. — In an action upon a negotiable note, brought by a remote indorsee against the maker, who undertakes to impeach the consideration, the law imposes upon the defendant the double burden of establishing not only the failure of the original consideration for the note, but also that the plaintiff acquired the same with notice, or without paying a valuable consideration.

PRE-EXISTING DEBT IS VALUABLE CONSIDERATION. — One who acquires a negotiable promissory note in payment of an existing debt is a purchaser for value and in the usual course of trade.

INDORSEMENT BY BONA FIDE HOLDER OF NEGOTIABLE NOTE, EFFECT OF. — A holder of a negotiable note from a *bona fide* indorsee takes it discharged from inquiry into its consideration, whether he has notice, or pays value or not. He has the rights of the *bona fide* holder through whom he claims.

CONTINUANCE — APPLICATION FOR, PROPERLY DENIED WHEN. — When a continuance is asked for the purpose of obtaining testimony which could not avail the party asking it, its refusal works no injury, and is not error.

A. S. Lathrop, for the plaintiffs in error.

W. Spence, and Leake, Shepard, and Miller, for the defendant in error.

MARR, J., Section A. The counsel for plaintiffs in error makes the following statement of the nature and result of the suit: "This suit was brought by the defendant in error, plaintiff below, against plaintiffs in error, on January 12, 1887, on a promissory note dated July 1, 1885, signed by J. L. Herman, and payable to his order six months after date, and indorsed by said Herman, and also by J. J. Levy and E. M. Tillman. In plaintiffs' petition, it is alleged that plaintiffs bought said note from Belle C. Pierce, and that the same was transferred to him for a valuable consideration before the same became due. On the second day of May, 1887, defendants filed their first amended original answer, pleading general demurrer, general denial, and failure of consideration, stating fully therein wherein there was a failure of consideration in said note, and that the same was procured by fraud and false representations, and also pleaded that the defendant in error herein had actual as well as constructive notice of the failure of consideration of said note before he became the possessor or owner of same, which plea was duly sworn to. On the twenty-seventh day of March, 1889, defendants filed their sworn application for a continuance of said cause. The application was overruled, and defendants forced into trial, which resulted in a verdict and judgment for plaintiff. On March 28, 1889, plaintiffs in error filed a motion for a new trial, which, on May 29, 1889, was overruled, to which defendants excepted, and gave notice of appeal in open court. Plaintiff in error also took a bill of exceptions to the order of the court overruling his application for a continuance."

Subsequently, and in due time, the defendants below perfected the writ of error to the supreme court. We shall postpone the first assignment of error for the present.

The second assignment of error is as follows: "The court erred in that part of its charge wherein it says: 'And to rebut this finding, it is necessary for the defendants to show,—1. That the consideration for which the note was given has failed, and that the plaintiff and his assigns had knowledge of such failure'; for the law is, that after defendants prove failure of consideration, then it devolves on plaintiff to show

that he got the note for a valuable consideration, without notice of failure of consideration."

The contest in this case is between the makers of the note (which is negotiable) and a remote or subsequent indorsee, between whom there is no privity: 1 Daniel on Negotiable Instruments, sec. 174. In the same paragraph of the charge in which the above language, by way of a qualification, is used, the court correctly instructed the jury, to the effect that the plaintiff, as the indorsee and holder of the note, "is presumed to have acquired it for value before maturity, and without notice of any failure of consideration": *Blum v. Loggins*, 53 Tex. 121; 1 Daniel on Negotiable Instruments, sec. 812. There being evidence tending to show a failure of the consideration for the note itself, the defendants below contend that after they had offered such testimony, the burden of proof was shifted to the plaintiff, and that it then devolved upon him to prove that he obtained the note without notice of this infirmity, and for value. This may be the rule between the maker and payee, or an indorsee and his immediate indorser, but not when the plaintiff is a remote indorsee, and sues no one in privity with himself. In such case, the defendant is required, under the law, to assume the double burden of establishing not only the failure of the original consideration for the note, but also that the plaintiff acquired the same with notice, or without paying a valuable consideration. In the present instance, there is no proof whether plaintiff had notice, or paid value or not. We think that, under the circumstances of this case, there was no error in the charge of the court in the particular here complained of; and this will also dispose of the fourth assignment of error, which presents the same question upon the action of the court in refusing to allow a special instruction upon the burden of proof: 1 Daniel on Negotiable Instruments, secs. 165, 812, 814, et seq.; *Blum v. Loggins*, 53 Tex. 121; *Greneau v. Wheeler*, 6 Tex. 515; *Collins v. Gilbert*, 94 U. S. 753. We do not determine where the burden of proof would be if the note originated in fraud perpetrated upon the maker. The court did not charge upon this subject at all, but only referred to the issue of fraudulent representations, etc., as affecting the right of defendants to plead the failure of consideration in case no deception was practiced on the maker, and then but incidentally. The defendants requested no charge upon the subject, and have not presented any assignment of error which in any wise raises

the question: *Blum v. Loggins*, 53 Tex. 121; 1 Daniel on Negotiable Instruments, secs. 166, 815. Neither this question, however, nor those already considered could scarcely be of controlling importance, or would affect the correctness of the judgment rendered below, as will appear from a consideration of the third assignment of error, which is as follows: "The court erred in that part of its charge wherein it says: 'If the notes were transferred to Mrs. Pierce in payment or satisfaction to her for money procured for an advancement to Shumard, and she had no notice of any failure of consideration in the same, if any, then the plaintiff would be entitled to recover'; because the same is not the law applicable to this case."

It is not questioned by the plaintiffs in error that Mrs. Belle Pierce (now Shumard) did in fact acquire the note without notice or knowledge of any fraud or failure of consideration. She thereafter transferred the note to the plaintiff. She had obtained title to the note through M. A. Shumard, the first indorsee. We think that the above instruction of the court was correct. It is the settled law of this state that one who acquires a negotiable promissory note in payment of an existing debt is a purchaser for value and in the usual course of trade: *Heffron v. Cunningham*, 76 Tex. 318, and authorities cited; *Blum v. Loggins*, 53 Tex. 137; *Alstin's Ex'r v. Cundiff*, 52 Tex. 453. We also hold, upon equally as good authority, that as Mrs. Pierce had thus acquired title to the note in good faith and for value, it is immaterial whether the plaintiff paid value, or had notice at the time when she transferred the note to him, if in fact the title passed to him by the transfer. He is protected by reason of her perfect title to the instrument, and as she could undoubtedly have recovered upon the note, so can he by reason of possessing her indefeasible rights in the paper. This view of the case would seem to necessarily lead to an affirmance of the judgment so far as the issues of law are concerned: *Watson v. Flanagan*, 14 Tex. 354; *McAlpin v. Finch*, 18 Tex. 831; *Blum v. Loggins*, 53 Tex. 121; *Scotland County v. Hill*, 132 U. S. 107; 1 Daniel on Negotiable Instruments, secs. 803 et seq.

The fifth assignment of error is too indefinite to require consideration. It is to the effect that "the court erred in refusing to grant a new trial for the reasons set forth in the motion therefor."

We recur now to the first assignment of error, which com-

plaints of the refusal of the court to grant the application for a continuance. It was the third application. Its purpose was to obtain the testimony of the plaintiff, by whom defendants say that they expected to prove that he obtained the note with notice of the fraud and failure of consideration, and without paying a valuable consideration. We have already held that these facts, if established, could not have the effect of defeating plaintiff's right of recovery derived through Mrs. Pierce. The refusal of the continuance worked no injury, therefore, to the defendants. But the application is fatally defective in diligence. The defendants waited more than two years after suit before taking any action to obtain the plaintiff's testimony, and then obtained a subpoena and filed interrogatories only a short time before the trial, notwithstanding the fact that they had already been granted two continuances in the case. The application was properly denied.

We conclude that the judgment ought to be affirmed.

NEGOTIABLE INSTRUMENTS — BURDEN OF PROOF. — A plaintiff suing upon a negotiable note or bill is presumed, in the first instance, to be a *bona fide* holder, but when the maker has shown that the note was obtained by fraud, the plaintiff may then be required to show under what circumstances and for what value he became the holder: *Vosburgh v. Diefsendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Henry v. Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580; *Commercial Bank v. Burgwyn*, 108 N. C. 62; 23 Am. St. Rep. 49; *Joy v. Diefsendorf*, 130 N. Y. 6; 27 Am. St. Rep. 484; *Lambe v. Burke*, 132 Pa. St. 413. It is not sufficient for the defendant in such a case to show that the note was procured without consideration; fraud must be proved in order to cast the burden of proof on the holder: *Galvin v. Meridian Nat. Bank*, 129 Ind. 439. The indorsee must recover, unless the defendant shows that such indorsee had notice of a failure of consideration, — mere suspicion will not do: *National Bank v. Anderson & Co.*, 28 S. C. 143. Similarly, where the instrument is shown to be tainted with usury, the burden of proof lies on the indorsee to show that he is a *bona fide* purchaser for value, before maturity, and without notice: *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; *Blackwell v. Wright*, 27 Neb. 269; 20 Am. St. Rep. 662. And where there has been a material alteration in a note, the burden of proof is on the holder to show that the alteration was innocently made: *Croswell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238. See also notes to *Bedell v. Herring*, 11 Am. St. Rep. 323, 324; *Commercial Bank v. Burgwyn*, 23 Am. St. Rep. 50.

ANTECEDENT DEBT A VALUABLE CONSIDERATION. — One who takes negotiable paper in payment of antecedent debt, before maturity, and without notice of any defect therein, is a holder for value: *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375; *contra*, *First Nat. Bank v. Strauss*, 66 Miss. 479; '4

Am. St. Rep. 579. But to protect the transferee, the debt must have been actually and absolutely extinguished in consideration of the transfer: *Mayer v. Heidelberg*, 123 N. Y. 332. And whether the debt has been so extinguished is a question for the jury: *Burroughs v. Ploof*, 73 Mich. 607.

NEGOTIABLE INSTRUMENTS — RIGHTS OF ONE PURCHASING FROM BONA FIDE PURCHASER. — *Bona fide* holder of a negotiable note may transfer good title thereto to one who has notice of the fraudulent character of the paper: *Vosburgh v. Dieffendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836. See also note to *Bedell v. Herring*, 11 Am. St. Rep. 322.

ATASCOSA COUNTY v. ANGUS.

[83 TEXAS, 202.]

MECHANIC'S LIEN NOT ENFORCED AGAINST PUBLIC BUILDINGS. — Builders' and mechanics' liens can only be created against public buildings and grounds when the right is expressly conferred by the statute, and the grant of a lien against "all buildings" will not be held to include public buildings and grounds, unless they are, by the express terms of the statute, included within its operation. The legislature of Texas has not named this class of public property as affected by such liens, nor has it prescribed any method by which they can be fixed or enforced.

W. J. Bowen, for the appellant.

No brief for the appellee.

FISHER, J., Section A. James Angus, plaintiff below, brought this suit against Oscar Crawford and Atascosa County. He seeks to recover against Crawford a judgment for the sum of \$334 for services rendered by plaintiff in labor expended in erecting the court-house of Atascosa County, Crawford being the contractor with the county for the erection of the court-house. He asked for judgment against the county of Atascosa, establishing and enforcing a laborer's, builder's, and mechanic's lien upon the court-house and public square of the county where said building is situated.

The court below rendered judgment in favor of plaintiff against Crawford for the amount sued for, and against Atascosa County, foreclosing a builder's and mechanic's lien on the court-house and public square of said county, with an order of sale of said property to satisfy the judgment. The county of Atascosa alone appeals.

The only question that we consider in disposing of this case is, Do the laws of this state create and permit the enforcement of builders' and mechanics' liens against the court-house and public square of a county? The statutes of this state that

create liens upon buildings and grounds in favor of builders and mechanics, and that provide the method of enforcing and establishing such liens, do not, in express terms, grant liens against a court-house and public square, or other public building used for public purposes. For reasons of public policy and the public necessity, courts, in construing statutes that create liens against buildings, generally do not include within the operation of the statute buildings and grounds used and devoted to public purposes and uses, and that are constructed for such purpose. The weight of authority numerically, and also for the better reason, assert the rule that builders' and mechanics' liens can only be created against public buildings and grounds when the right is expressly conferred by the statute; that the grant of lien against "all buildings" will not be held to include public buildings and grounds, unless they are, by the express terms of the statute, included within its operation: *Breneman v. Harvey*, 70 Iowa, 480; *Leonard v. City of Brooklyn*, 71 N. Y. 499; 27 Am. Rep. 80; *Foster v. Fowler*, 60 Pa. St. 27; *Board etc. of Panola Co. v. Gillan*, 59 Miss. 199; *Secrist v. Board of Comm'rs*, 100 Ind. 59; *Board of Comm'rs v. O'Conner*, 86 Ind. 531; 44 Am. Rep. 338; *Whiting v. Story County*, 54 Iowa, 81; 37 Am. Rep. 189; *Fatout v. School Commissioners*, 102 Ind. 224; *Thomas v. Urbana School Dist.*, 71 Ill. 284; *Guest v. Lower Merion Water Co.*, 142 Pa. St. 610; *Hovey v. East Providence*, R. I., July 5, 1890, 20 Atl. Rep. 205; 2 Jones on Liens, sec. 1375; Phillips on Mechanics' Liens, sec. 179; 2 Dillon on Municipal Corporations, sec. 577.

The legislature, in carrying into effect the constitutional provisions on the subject of mechanics' liens, has not named this class of public property as affected by such liens; and in providing the method by which those liens are fixed, has failed, in the laws that regulate such procedure, to recognize any right to fix liens against such public property as in controversy here.

We conclude the case should be reversed and dismissed as to Atascosa County.

PUBLIC PROPERTY AND PUBLIC BUILDINGS are not subject to mechanics' liens: *Mayrhofer v. Board of Education*, 89 Cal. 110; 23 Am. St. Rep. 451; *Bates v. Santa Barbara County*, 90 Cal. 542.

ALSTON v. EMMERSON.

[83 TEXAS, 231.]

JUDGMENT WITHOUT SERVICE ON MINOR DEFENDANTS REPRESENTED BY GUARDIAN AD LITEM NOT VOID. — A judgment rendered without actual service of process on minor defendants who were represented by a guardian *ad litem* appointed by the court is not void, and cannot be attacked collaterally.

JUDGMENT NOT VOID BECAUSE IT OMITTS TO DISPOSE OF RIGHTS OF ALL PARTIES TO SUIT. — The omission in a final judgment rendered in a suit for partition to name one of the parties shown by the pleadings to have an interest in the land does not render the judgment void, and parties not injured by such omission cannot take advantage thereof. It may also be presumed, in support of the judgment, that some reason was shown in the proceedings for the omission.

Word and Reeves, and C. F. Clint, for the appellants.

Cobb and Avery, for the appellee.

STAYTON, C. J. This action was brought by appellee to recover lands which once belonged to John D. Alston, and the rights of the parties depend on the validity of a judgment through which the lands were partitioned among his heirs. The original decree directing partition was entered on April 29, 1878, by the district court for Dallas County, and the report of commissioners was approved and final partition made on May 7, 1879.

Appellants took a part of the land in controversy, as heirs, in that partition, and the residue of that in controversy was set apart to another heir of John D. Alston, and the interests of these persons were acquired by appellee under sales made under executions against these distributees for costs of partition adjudged against them. These sales are admitted to have been regularly made, and it is further conceded that appellee paid valuable consideration without knowledge of any vice in the judgment under which the executions issued; but it is claimed that the judgment was void because appellants, who were minors when the judgment was rendered, were not cited, although they were represented by a guardian *ad litem* appointed by the court.

The suit in which the judgment in question was entered was brought by the other heirs of John D. Alston against appellants on September 20, 1875, and citations to the defendants were issued on the day the suit was brought, commanding them to appear at the next October term of the court, but the

returns made on these citations, on the 27th and 29th of the same month, showed that they were not served, because defendants were not to be found in Dallas County, and no other citations were found among the papers of the case, and the record does not affirmatively show that any others were issued.

This is an agreed case, and the other facts affecting the question of jurisdiction are thus given: —

“6. The following entry is made on the judge’s docket, viz.: ‘October term, 1875, Philip Lindsley appointed guardian *ad litem* for the defendants, Thomas and Richard Alston.’ There is nothing else to indicate when the guardian *ad litem* was appointed. June 15, 1876, the guardian *ad litem* filed for the said Thomas and Richard Alston an answer containing a general and special demurrer and a general denial. Said guardian represented said minors throughout said proceedings, and in the judgment affirming the report of the commissioners appointed, as hereinafter shown, to divide the land, a fee of twenty-five dollars was allowed said guardian *ad litem* for his services as such.

“7. April 29, 1878, John M. Stemmons was permitted to intervene in said cause. In his plea of intervention filed on said date, he alleged that on April 9, 1858, Richard Alston, Sen., father of defendants, Thomas and Richard Alston, sold by metes and bounds 50 acres of said 426 acres survey to Jesse Atterburry, and that Atterburry afterward sold the same to Estes, and Estes afterward sold the same to intervener; intervener asked that fifty acres of the land to which Richard and Thomas Alston were entitled by reason of their heirship from their father, Richard Alston, Sen., be set aside to him.

“8. April 29, 1878, judgment was rendered in said cause. There were no recitals in said judgment that defendant had been served with citation, or that the court had jurisdiction over their persons, other than the following recital in the judgment, viz.: ‘This day came the parties by their attorneys, and waive a jury, and submit the matters in controversy, as well of fact as of law, to the court; and the evidence and argument of counsel being heard,’ etc. This judgment determined the interest of each of the parties in said tract of land. The interest of Richard and Thomas Alston together was adjudged to be one sixth, out of which it was decreed that the intervener, John M. Stemmons, was entitled to fifty acres. Commissioners were appointed to partition said survey in accordance with said judgment, and were directed to set aside

to intervenor fifty acres out of the one sixth adjudged to the said Richard and Thomas Alston.

"9. The original petition filed in said partition proceedings represented that there were four of the Angell heirs, entitled together to one twelfth of said survey; the four heirs were named. The decree made no mention of Thomas Angell, one of the Angell heirs, but it ascertained and named the parties to whom the land in controversy jointly belonged, and assigned to each one his interest, naming the three Angell heirs entitled to one twelfth, and upon this basis partition was made. After the original petition was filed, it appears of record that leave was given plaintiffs to file an amended petition; but no amended petition was found among the papers of the cause."

Appellants, over objection of appellee, testified that they were never served with citation in this partition suit, but that they knew of the proceedings and partition under them a few days after the commissioners partitioned the land; and one of them at time of trial was twenty-seven years old, and the other twenty-nine.

"It is admitted by the parties that unless it affirmatively appears from the record as above set out in said partition proceedings that the court did not have jurisdiction over the persons of defendants, or unless they could show a want of jurisdiction over their persons by oral evidence, that then said judgment is valid and binding on defendants. The parties therefore submit for the decision of the supreme court the following issues: —

"1. Does the record in said partition proceedings as above set out show affirmatively the want of jurisdiction over the persons of defendants?

"2. If the record does not show the want of jurisdiction over the persons of defendants, can it be shown by the oral evidence of the defendants themselves in this proceeding?

"3. If, however, the court did not have jurisdiction over the persons of the defendants, but nevertheless appointed a guardian *ad litem* for them, who represented them throughout the proceedings, what would be the effect of the judgment rendered under such circumstances against the minor defendants?

"4. If the judgment rendered in said partition proceedings is valid and binding on these defendants, would it be *res adjudicata* as to any other title except that which the record

above set out shows to have been involved in that proceeding? and if it was not, does the evidence show that John D. Alston gave the survey to the father of these defendants? or does the evidence show a title by limitation in them under the ten years' statute of limitation?

"5. It is agreed that the court may render such judgment as the law and facts may warrant."

In the view taken of one question involved in this case, it is not necessary to consider the first and second issues submitted; for if it be conceded that it was shown in any lawful manner that appellants were never served with process in the partition suit, still all the members of this court concur in holding, under the former decisions of this court, that the judgment through which appellee acquired right was at most only voidable.

It appears that appellants were represented by a guardian *ad litem* appointed by the court, and the question whether a judgment rendered under such circumstance against a minor not actually brought into court by service of process was void or only voidable was considered, after having been long held under advisement, by this court in the case of *McAneer v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625, in which it was held that a judgment rendered without actual service of process on the minors who were represented by a guardian *ad litem* was not void. That decision has doubtless been often acted upon, it has become a rule of property, and in view of the great conflict of authority upon the question involved, were this not so, we would not feel authorized now to establish a different rule. The case referred to is in harmony with the former decisions of this court: *Thomas v. Jones*, 10 Tex. 52; *Kegans v. Allcorn*, 9 Tex. 34; *Wheeler v. Ahrenbeak*, 54 Tex. 536.

Cases have been before this court on appeal or writ of error in which judgments were reversed for want of service on minors, notwithstanding they were represented by guardians *ad litem*, and expressions may be found in some of these cases from which the inference might be drawn that the writer of the opinion may have inclined to the view that judgments rendered under such circumstances were void: *Kremer v. Haynie*, 67 Tex. 451; *Sprague v. Haines*, 68 Tex. 218. The difference between void and voidable judgments, and between direct and collateral attacks on judgments, is too well understood to now require statement.

The judgment under consideration in this proceeding must be held binding on appellants.

It is contended, however, that the judgment partitioning the estate of the grandfather of appellants would not operate as a bar to any right they may have taken by inheritance from their father, and it seems to be claimed that their father acquired title to the tract of land of which that in controversy is a part through a verbal gift from their grandfather, as well as by adverse possession. We are of opinion, however, that there was no evidence sufficient to show that the father of appellants had acquired title by verbal gift from their grandfather, nor to show that their father or themselves had acquired title by limitation, and it therefore becomes unnecessary to inquire whether the rule asserted in *Thompson v. Cragg*, 24 Tex. 582, would have application were the facts sufficient to show title to the land in the father of appellants.

The sale under execution through which appellee claims was made in September, 1879, and passed all interest appellants had in the tract of land set apart to them, and as this action was instituted on October 7, 1886, appellants could not have acquired title to any of that land, or to the land set apart to the other heir of John D. Alston, by limitation, even if they had been shown to have been in continuous possession of those parts of the tract at all times since appellee acquired right; but it is not shown that they have ever had possession of those parts at any time.

It is urged that the judgment rendered in the partition suit was void because it did not dispose of the rights of all parties to it. This is based on the fact that the original petition alleged that the four Angell heirs were entitled together to one twelfth of the tract to be partitioned, whereas the final decree gave one twelfth of the tract to three of the Angell heirs, and made no mention of the fourth. This fact would strengthen the inference which arises from other parts of the record, that the record of the proceedings in the partition suit produced on the trial of this cause was not a complete record, and it might be presumed that when leave to do so was given, an amended petition was filed which showed why one of the Angell heirs ought or could not longer be a party to the suit, and why the one twelfth of the tract should be given to three instead of four; but if the decree did in fact fail to dispose of the right of one, a party to the proceeding and having an interest in the land, this would not render the

decree void, nor could appellants take advantage of any such defect in the proceedings not operating to their injury, in order to invalidate the title of appellee acquired through sales made under process issued against themselves and another under that decree.

We find no error in the judgment, and it will be affirmed.

JUDGMENTS AGAINST MINORS. — The general rule is, that judgment against an infant defendant cannot properly be rendered in a civil action, unless he has a guardian who may defend in his behalf: *Johnson v. Waterhouse*, 152 Mass. 585; 23 Am. St. Rep. 858. Unless a guardian *ad litem* is appointed for the infant, judgment against him is erroneous and reversible: *Griffith v. Ventress*, 91 Ala. 366; 24 Am. St. Rep. 918; even though counsel enters an appearance for him: *Brown v. Downing*, 137 Pa. St. 569. But the appearance of a general guardian will be sufficient to give the court jurisdiction of an infant: *Western L. Co. v. Phillips*, 94 Cal. 54. Nor is the fact that an infant was not personally served with a summons, in a proceeding to sell land to make assets, service being made upon his mother, such an irregularity as will authorize the vacation of an order of sale and of confirmation, where it appears that the infant was represented by a guardian *ad litem*: *Carter v. Rountree*, 109 N. C. 29. Under a statute allowing personal service to be made on an infant defendant over fourteen years of age, it was held that, although the court thereby acquired jurisdiction of his person, it was error to proceed to judgment without appointing a guardian *ad litem*, and the judgment was therefore voidable: *Eisenmenger v. Murphy*, 42 Minn. 84; 18 Am. St. Rep. 493. The guardian, however, must be a party as guardian, and not merely as an individual, or the judgment will not bind the infant: *Salter v. Salter*, 80 Ga. 178; 12 Am. St. Rep. 249. But if the infant is regularly brought into court, and a guardian appointed, he will be as much bound by the proceedings as an adult: *Sites v. Eldredge*, 45 N. J. Eq. 632; 14 Am. St. Rep. 769 (a case of partition). As to service of process on infants, see note to *Welch v. Agar*, 20 Am. St. Rep. 382.

DECREE IN PARTITION, WHO MAY COMPLAIN OF. — If the persons not made parties are satisfied, those who were cannot be heard to complain: *Williams v. Wescott*, 77 Iowa, 332; 14 Am. St. Rep. 287.

PRESUMPTIONS IN FAVOR OF REGULARITY OF JUDICIAL PROCEEDINGS: See notes to *Hersey v. Walsh*, 8 Am. St. Rep. 691, and *McGowan v. Lufbarres*, 14 Am. St. Rep. 183.

COOPER v. CITY OF DALLAS.

[83 TEXAS, 220.]

MUNICIPAL CORPORATION, LIABILITY OF, FOR DAMAGE TO PROPERTY IN GRADING AND SEWERING ITS STREETS. — Under the constitution of Texas, a city is liable for damage to private property resulting from the overflow of water caused by its raising the grade of the street above the adjoining lots, and its failure to provide a sufficient sewer to carry off the water, notwithstanding it has authority by its charter to grade its streets and lay sewers therein.

DUTY OF PARTY INJURED TO USE CARE AND MEANS TO AVOID INJURY. — A person is bound to use ordinary and reasonable care and means to prevent an injury and the consequences of it, and he can only recover damages for such losses as could not by such care and means be avoided, but what constitutes such care and means is a question for the jury to decide. And while it may be the duty of the injured party to incur a moderate expense to protect himself from damages, what may be treated as moderate will depend upon many considerations, and must be determined by the peculiar circumstances of each case.

Alexander and Clark, and George H. Plowman, for the appellant.

A. P. Wozencraft and M. Trice, for the appellee.

HENRY, A. J. This suit was brought by the appellant to recover damages caused by an overflow of his premises. The case is presented to us upon the following agreed statement: "Said waters were caused to flow upon said lands, first on April 23d, and then on the 24th, 1887, by the city of Dallas, in the exercise of its authority, conferred upon it by its charter, by grading and paving Elm Street and Preston Street, the grade of said streets being thereby raised higher than the adjacent lands and the lands of the plaintiff, and by reason of the insufficiency of the sewer laid by the city in the alley in the rear of the plaintiff's said premises, and by reason of the stopping up of a catch-basin on Preston Street at the mouth of said sewer, whereby the waters gathered on Elm and Preston streets were concentrated at a point just east of plaintiff's said home, and were discharged upon his premises. Plaintiff's premises, at a cost of five hundred dollars, could have been raised to the grade of the streets so as to have prevented the overflow. It was shown that plaintiff's property, like all other property on Elm and Preston streets, was greatly increased in value by reason of the grading and paving of Elm and Preston streets."

The court charged the jury that the city had the right to grade and pave the streets and to construct the sewer; and

further, that "it appearing from the evidence, without contradiction, that the plaintiff contributed by his own negligence to the damages he complained of, and that but for his own negligence such damages would not have occurred, he is not entitled to recover for such damages. You are therefore instructed to return a verdict for the defendant."

We find nothing in the record justifying this charge, or tending to show that plaintiff was guilty of contributory negligence. It is suggested in argument that the charge was given because the court felt constrained to follow an unpublished opinion of the commission of appeals in the case of *Wallace v. City of Dallas*, rendered in 1884, a case to which we do not now have access.

There are numerous decisions holding that acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are not a taking within the meaning of the constitutional provision, and do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action: *Chicago v. Taylor*, 125 U. S. 164. We do not doubt the correctness of such a decision under laws only requiring compensation to be made for property taken for public use.

The provision in our constitution now reads: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such persons": Const., art. 1, sec. 17. In other states in whose laws a like change has been made, the right to recover damage where there has been no direct or physical invasion of the property is now recognized: *Chicago v. Taylor*, 125 U. S. 164. The same doctrine was announced by this court in the case of *Gainesville etc. R'y v. Hall*, 78 Tex. 169; 22 Am. St. Rep. 42.

"It is the duty of a person to use ordinary and reasonable care and means to prevent an injury and the consequences of it, and he can only recover damages for such losses as could not by such care and means be avoided": Field on Damages, sec. 29.

What constitutes such care and means is a question for the jury to decide. There may be instances in which the diligence to be exercised is so slight that the court may control the issue by its charge. But this case does not belong to that class. There is nothing in the record before us to indicate

that it was the duty of the plaintiff to expend five hundred dollars to save his property from damage, much less to show that the court could take the question from the jury. While it may be the duty of the injured party to incur a moderate expense to protect himself from damages, what may be treated as moderate will depend upon many considerations, and must be determined by the peculiar circumstances of each case.

There are other questions in the case, but as they were not passed upon in the court below, we will not consider them now.

The judgment is reversed, and the cause is remanded.

MUNICIPAL CORPORATION. — LIABILITY FOR DAMAGES CAUSED BY OVERFLOW RESULTING FROM GRADING OF STREETS: See *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 362, 363; *Rychlicki v. St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158; *Bush v. Portland*, 19 Or. 45; 20 Am. St. Rep. 789, and notes. A municipal corporation diverting the flow of surface water, so that it accumulates and flows upon abutting property where it would not flow naturally, is liable to the abutting owner in damages for the resulting injury: *Torrey v. City of Scranton*, 133 Pa. St. 173.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE SEWERS. — A municipal corporation is liable, not only for negligence in the construction of a sewer, but also for negligence in failing to keep it in repair: *Mayor etc. of Frostburg v. Duty*, 70 Md. 57. But if a city adopts a proper plan of drainage, and lets a contract for the doing of the work, the contractor to use his own methods and means for the construction of the drain, the city is not liable for the contractor's negligence. Such liability attaches only when the city adopts a defective plan, and a special injury results to a property owner by reason of negligence in devising the plan: *City of Seymour v. Cummins*, 119 Ind. 148. A town also is liable to a land-owner for damages resulting from neglect to keep its sewers free from obstructions: *Bates v. Westborough*, 151 Mass. 174. See also *Pye v. Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Hutchins v. Mayor*, 68 Md. 100; 6 Am. St. Rep. 422; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158. But where a land-owner, with the consent of a city, constructed a private sewer to connect with a public one, and the premises afterwards became the property of the city, it was held that the character of the drain as a private one was not changed by the transfer to the city, and that another land-owner, who, by permission of the city, connected his premises with said drain, could not hold the city liable for flowage caused by obstructions therein: *Kornak v. Mayor etc. of New York*, 117 N. Y. 361.

CONTRIBUTORY NEGLIGENCE will not be imputed to plaintiff in an action for injury caused by defective sewers, on the ground that his house was built on an embankment made in a dry run, by which the natural outlet for surface water from the surrounding hills is obstructed: *Mayor etc. of Frostburg v. Duty*, 70 Md. 47.

DUTY OF INJURED PERSON TO KEEP DOWN DAMAGES: See note to *Wright v. Bank of Metropolis*, 6 Am. St. Rep. 364, 365. The rule was applied to a passenger expelled from a train in *Georgia R. R. etc. Co. v. Bakewell*, 86 Ga. 641; 22 Am. St. Rep. 490.

JOHNSON v. ARMSTRONG.

[88 TEXAS, 325.]

AGENT CONTRACTING FOR PRINCIPAL DOES NOT BIND HIMSELF WHEN. —

When an agent of a corporation, without expressly binding himself, requests an architect to prepare plans and specifications for a college building, the latter knowing such building to be intended for a public and not for a private purpose, and being aware of circumstances which, if inquired into, would have developed a responsible principal, such agent will not be personally bound for services rendered in the preparation of such plans and specifications.

Stanley, Spoons, and Meek, for the appellant.

Field, West, and Smith, for the appellees.

HENRY, A. J. Appellees, as partners, sued appellant for the value of professional services rendered as architects, at appellant's request, in the preparation of plans and specifications for a university building and college to be erected at Fort Worth, Texas, alleging the value of such services to be fifteen hundred dollars. Defendant claimed that he was at the time president and financial agent of the Fort Worth University, a corporation duly incorporated for educational purposes, which was solvent and responsible, and contemplating the erection of said building; that appellees desired to submit to him as agent of said corporation said plans, etc., with the hope and purpose of being employed to superintend the construction of said building, if such plans were adopted, as is usual in such cases; that he never assumed nor intended to become individually responsible to appellees for the work done or to be done by them, and never promised to pay them anything for their services; that the plans were not adopted, and the work was not requested nor done for him as an individual.

The cause was tried without a jury, and a judgment was rendered for plaintiffs.

It appears from undisputed evidence that the Fort Worth University was a corporation, and that the defendant was its president and financial agent; that Johnson requested plaintiffs to do the work which is the foundation of their claim; that they performed it; and that their services were reasonably worth the sum for which judgment was rendered in their favor.

There is no evidence that Johnson bound himself expressly to pay plaintiffs for their work. The evidence of plaintiffs

relating to this issue was substantially as follows: "I knew the defendant was financially responsible, and plaintiffs looked to him for the pay for our work. I knew nothing about the Fort Worth University, — whether it was a corporation or not. I knew that the building for which we were preparing plans was to be a school or college building. I had heard that defendant had something to do with the college, and I believed that he was having the plans made for a building to be used as a college or university building, but the church, and college, and university, nor anything, had anything to do with the work we did. We did that for Dr. Johnson, the defendant. Plaintiffs would not have done the work if they had not known or believed that defendant was to pay for it. We knew that he was a thoroughly responsible man financially, and we gave credit to him because we believed, from what transpired between us, that he was responsible to us for the same. I do not know that defendant said expressly that he would pay for the plans, but he ordered the work done, and said nothing about any one else paying for it."

In *Buck v. Amidon*, 41 How. Pr. 378, the law upon the subject was stated in a quotation from an opinion by Lord Kenyon, in the following language: "If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only. . . . But whenever an order is given by one person for another, and he informs the tradesman who the person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable": *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429.

In verbal contracts, "if the agent does not disclose his agency and name his principal, he binds himself personally": *Ewell's Evans on Agency*, 414, note 1.

If Johnson had a principal capable of being bound, and whom he had authority to bind by the contract, and if the contract was about the business of the principal, and such facts were known to the plaintiffs, then, as Johnson did not expressly bind himself, it must be held to be the contract and

debt of his principal, for which he is not responsible. It clearly appears that plaintiffs knew that the building was intended for a public and not for a private purpose. The evidence does not, in so many words, show that they knew that the building was to be constructed by an existing corporation so as to apprise them that Johnson had a principal capable of being bound by the contract. But it does show that there was in fact such a corporation and principal, and the circumstances that were known to plaintiffs were sufficient to put them upon inquiry. The inquiry that it was their duty to make, under the circumstances of this case, would have developed a responsible principal, and it is difficult to conclude that plaintiffs did not have actual knowledge that they were dealing with a corporation, notwithstanding the fact that they did not, at the time of making the contract, inquire for or get that information from Johnson, the agent.

It is unnecessary for us to enumerate here all of the circumstances of the transaction leading to this conclusion, or all of the reasons upon which we predicate it.

The judgment is reversed, and the cause is remanded.

PERSONAL LIABILITY OF AGENT ON CONTRACTS: See notes to *Hobson v. Hassett*, 9 Am. St. Rep. 196; *Wallace v. Bentley*, 11 Am. St. Rep. 234; *Tarver v. Garlington*, 13 Am. St. Rep. 632. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract as principal: *Bulwinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645.

BROOKS v. LEWIS.

[83 TEXAS, 335.]

SHERIFF'S SALE, PLAINTIFF PURCHASING AT, NEED NOT PAY THE AMOUNT OF HIS BID. — When a sheriff, who is holding personal property by virtue of a writ in favor of the purchaser, sells it under such writ, the amount of the bid being less than the amount of the judgment upon which the writ issued, the purchaser is entitled to the possession of the property upon paying the costs and receipting for the balance of his bid, although the property in the sheriff's hands may be liable to seizure and sale to satisfy the debt of a person having a superior lien thereon.

SHERIFF'S SALE OF ENCUMBERED PROPERTY, WHAT PASSES BY. — When a sheriff sells encumbered property, the purchaser acquires the equity of redemption only, — that is, the right to pay the prior lien and hold the property.

MEASURE OF DAMAGES FOR SHERIFF'S REFUSAL TO DELIVER ENCUMBERED PROPERTY SOLD BY HIM. — When a sheriff sells encumbered property,

and refuses to deliver possession thereof to the purchaser, and the latter sues him for conversion, the measure of damages is the excess of the value of the property over the amount of the lien, with interest from the date of the conversion.

Dixon and Moroney, for the plaintiff in error.

Field and Homan, for the defendants in error.

STAYTON, C. J. This action was brought by appellant against appellee and the sureties on his official bond as sheriff, to recover the value of six transfer wagons, alleged to be the property of appellant, and converted by Lewis.

The cause was tried without a jury, and resulted in a judgment for defendants.

Appellant's claim arises under the following facts: Brooks sued the Dallas Passenger Transfer Company, on January 31, 1888, to recover a debt, and sued out a writ of attachment, which on the same day was levied on the six transfer wagons, and on July 8, 1888, appellant recovered a judgment foreclosing the attachment. Under this judgment, an order to sell went into the hands of the sheriff on September 19, 1888, and on October 1st following, the wagons were sold, and appellant became their purchaser for the sum of \$299, which was less than the amount of the judgment in his favor. Appellant tendered to the sheriff the amount of cost due, and demanded the wagons, but the sheriff refused to deliver them unless the entire sum bid was paid, whereupon this action was brought.

The grounds on which the sheriff refused to deliver the wagons to appellant on payment of costs will be seen from the following statement: —

On July 13, 1888, W. J. Keller brought an action against the Dallas Passenger Transfer Company to recover a debt secured by mortgage on the wagons before referred to, and to foreclose that chattel mortgage, which bore date January 23, 1888, and was filed for record on the same day. Keller prayed for a writ of sequestration, and alleged that the six wagons were then in possession of the sheriff by virtue of the seizure made under the attachment sued out by appellant. Judgment was rendered in favor of Keller for \$928.54, on August 8, 1888, with decree of foreclosure, under which order of sale issued August 31st, returnable in thirty days, on which the sheriff made the following return: "Not executed, by reason of the fact that the said omnibuses were levied on and held by me by virtue of a writ of attachment of G. W.

Brooks v. Dallas Passenger Transfer Company et al., and I could not sell the same without delivering possession thereof without violating the law compelling me to hold said property under said attachment."

Neither Brooks nor the sheriff were made parties to the suit brought by Keller, and so far as the record shows, no sequestration issued in the suit brought by him.

The court found that the value of the transfer wagons at the time same were sold under the writ issued in favor of Brooks was twelve hundred dollars, and it appeared that the property was in the hands of the sheriff at time of trial. On this state of facts, the court adjudged that appellant was entitled to no relief, and entered a judgment against him for costs.

It is obvious that the sheriff held the property when it was sold to appellant solely under writs issued in his behalf, and when the sale was made, it was the duty of the sheriff, on payment of costs by Brooks, to deliver the wagons to him, the judgment in his favor amounting to more than his bid.

When the writs in favor of Brooks and Keller were in the hands of the sheriff, he should have sold under both; and if the parties had not then agreed as to the proper disposition of the proceeds, he might have insisted upon the payment of the bid in full, and have paid the money into court, requiring the parties there to settle their respective rights to the fund; but not having done this, and not having seized the property by virtue of any writ issued in behalf of Keller, when Brooks bought he became entitled to the possession of the property on payment of costs and receipting for the balance of his bid, although the property in his hands would have been liable to seizure and sale to satisfy the debt due to Keller, if, as appears from the record, the latter had the superior lien on the property. It does not follow from this, however, that Brooks would be entitled to recover the full value of the property from the sheriff and the sureties on his official bond, as would he be if, by his purchase, he had acquired an unencumbered title to the property. He only acquired by his purchase the right to pay the debt due to Keller secured by mortgage, and then to hold the property, — the equity of redemption; and the value of that with interest would be the measure of his damages.

It appearing that the sum due to Keller was less than the value of the property, the judgment entered should not have been rendered; but in view of the fact that the case has not

probably been fully developed, this court will not render a judgment, but will reverse the judgment and remand the cause.

It is so ordered.

SHERIFF'S SALE, WHAT INTEREST PASSES BY. — The general rule is, that the purchaser at an execution sale acquires whatever estate or interest the defendant in execution owns and possesses, and succeeds to his title and rights, including the right of possession: *Cotton v. Carlisle*, 85 Ala. 175; 7 Am. St. Rep. 29; *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381. If the judgment debtor has no interest, none passes by the sale to the purchaser: *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40. A sheriff's deed takes precedence over subsequent liens and transfers, and, to this extent, the deed when executed takes effect by relation, and must be treated as though made on the day when the execution lien was created: *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613. A corollary to this rule is, that the lien on land acquired by the levy of an execution is superior to that of a prior unrecorded mortgage, although the mortgage is subsequently filed for record before the sale of the land: *Hawkins v. Files*, 51 Ark. 417. The date at which the lien of an execution attaches will depend upon the statutory provisions regulating execution proceedings. Thus in Colorado an execution is a lien on the personal property of the debtor from the date of its delivery to the sheriff, and the priority of the respective liens is ascertained accordingly: *Joslin v. Spangler*, 13 Col. 491. In Indiana, on the other hand, the execution becomes a lien on the real estate of the debtor from the day on which the levy is made: *Hamilton v. Byram*, 122 Ind. 283. See also note to *Sawyer v. Bray*, 11 Am. St. Rep. 716.

FLIPPEN v. DIXON.

[83 TEXAS, 421.]

RES ADJUDICATA — FORMER ADJUDICATION BAR TO ACTION WHEN. —

When an issue is raised by a plea in reconvention, but is not for some reason submitted to the jury with other special issues in the case, the exclusion thereof from the consideration of the jury is an adjudication of it as conclusive on the parties as if it had been decided by the jury and expressed in their verdict or the judgment; and if the same issue be raised in a subsequent suit between the same parties, such former adjudication will be a bar to the action. The fact that the exclusion was erroneous does not make it the less binding or effective as an adjudication. The only remedy in that case was by motion for a new trial, appeal, or other proper means.

A. T. Watts, and Word and Reeves, for the appellants.

Coombes and Gano, for the appellee.

HOBBS, P. J., Section A. J. M. Dixon, the appellee, sued Paul Gluckman, W. H. Flippen, and Alfred Davis, in the district court of Dallas County, on December 20, 1886. to

recover actual and exemplary damages for the wrongful and malicious issuance of a writ of sequestration, under which appellee's homestead was alleged to have been seized, and the furniture and household effects of his family and himself removed, and he caused much inconvenience and suffering thereby. He recovered a judgment for one thousand dollars actual damages against all of the defendants, and six thousand dollars exemplary damages against Gluckman alone. Flippen and Davis were sureties on Gluckman's sequestration bond, and they only have appealed from the judgment for one thousand dollars actual damages.

The defense relied on in this suit is, that the writ of sequestration, for the alleged wrongful issuance of which damages are sought, was issued in cause No. 5361, in the district court of Dallas County, styled *Paul Gluckman v. J. M. Dixon*; that appellee, Dixon, who was defendant therein, by plea in reconvention sought to recover the same actual and exemplary damages sued for here, and that this claim for damages was decided and adjudicated in that proceeding.

The proof in the case under consideration, in the order adduced on the trial, consisted of the testimony of the appellee, his wife, and another witness, each of whom recited in detail the circumstances under which the property (a house and lot and improvements in the city of Dallas) was seized by virtue of the writ, and the removal of appellee's furniture, etc., into the street, and the damage and inconvenience resulting therefrom. These facts were testified to by these witnesses on the trial of the cause No. 5361, a record of the proceedings in which was also introduced in evidence by the appellants. That suit was brought by Gluckman against Dixon in January, 1885, in the district court of Dallas County, for the recovery of the property, and as stated, the writ of sequestration issued. Gluckman's title or right to the property originated in a purchase thereof at a sale under a trust deed.

It is disclosed by the answer of appellee, Dixon, in that cause, that the property belonged to his wife, who had executed the trust deed to secure a certain indebtedness mentioned, and that Gluckman became the purchaser at the sale, which was alleged to have been fraudulently made; setting forth in detail the grounds of the fraud, and asking that it be set aside, etc. He pleaded, as stated, in reconvention actual and exemplary damages for the wrongful and malicious levy of the writ of sequestration.

The court submitted to the jury special issues, directing them to find whether the sale at which Gluckman became the purchaser should be set aside, what was the value of the property, what was the amount of Gluckman's bid, what was its rental value while in his possession, and what was the amount of taxes paid and improvements made by him on the property.

The findings were, that the sale should be set aside; that \$6,000 was the value of the property, \$1,275 was bid at the trust sale, and \$1,083 its rental value, and \$260 was the amount paid in taxes on the property by Gluckman.

The judgment vested the title to the property in Dixon on the payment by him to Gluckman of \$740 within a specified time.

This being the state of the proof in this case, the court instructed the jury that the proceedings in the former cause No. 5361 show that the issue relating to damages for the wrongful and malicious levy of the writ of sequestration was not adjudicated therein, and this was followed by the instruction to find against the defendant's plea of *res adjudicata*. After stating the measure of damages, the charge informed the jury that the legal effect of the judgment in the former cause was, that "the writ of sequestration was wrongfully issued." These instructions appear to be contradictory, and were calculated to confuse.

The charge first referred to was erroneous. If the effect of the former proceedings was to show that the writ was wrongfully issued, it is difficult to understand why the issue of damages for its wrongful levy, the issue raised by the plea in reconvention, was not adjudicated in some form. Gluckman's title to the property was invalid, and was vacated by the court, and Dixon's recovery was upon the theory that the property belonged to him. Such being the case, no grounds existed authorizing the levy of the writ of sequestration. That the facts existed which sustained appellee's plea in reconvention is shown by the further fact that the same testimony relied on in this case to support the judgment for damages was before the court and jury in the former cause to sustain said plea. Special issues, it is true, were submitted in that cause to the jury, and it does not appear that this was included among them.

But this would plainly indicate that this issue was excluded by the court from the jury's consideration. This would be an

adjudication of it by the court, which would be as conclusive upon the appellee as if it had been decided by the jury, and was expressed in their verdict or the judgment. The fact that it should not have been excluded from the jury would not make it the less binding or effective as an adjudication after it had been so excluded. The court might have committed an error injurious to appellee in so doing. If so, the remedy was manifest, and it should have been corrected by motion for new trial, appeal, or other proper means. We think it appears from the record in the cause No. 5361 that the plea in reconvention was adjudicated therein, and that the petition in this cause raises the same issue, and that therefore the plaintiff is precluded from a recovery for damages for the alleged wrongful and malicious levy of the writ of sequestration.

We conclude that the judgment should be reversed and rendered for appellants.

RES ADJUDICATA: See notes to *Gayer v. Parker*, 8 Am. St. Rep. 229-231; *Hawk v. Evans*, 14 Am. St. Rep. 250, 251; *Gould v. Sternburg*, 15 Am. St. Rep. 142, 143; *Huntley v. Holt*, 21 Am. St. Rep. 74. A party relying on a former adjudication as a bar must show that the point involved was decided in the former suit: *Unglish v. Marvin*, 128 N. Y. 381. The issue in the second suit must have been a material issue in the first suit, and necessarily involved therein, and the judgment must have been upon the merits: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387. If the same evidence will not support both causes of action, they are not identical: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436. Recent cases illustrating the principle of *res adjudicata* are *Shaw v. Broadbent*, 129 N. Y. 115 (former judgment not a bar to a suit for specific performance of a contract for the sale of land); *Earle v. Earle*, 33 S. C. 498 (decree for the sale of real property to pay intestate's debts a bar to an action fourteen years afterwards by the distributees of the estate upon a note given by the administrator to the decedent, the first action having necessarily involved an accounting by the administrator for the personalty, and an adjudication that the personalty was insufficient to pay debts); *Wetherald v. Van Stavoren*, 125 Pa. St. 535 (decision by referee that a judgment in favor of a trustee for defendant's wife and others was not fraudulent is binding upon a referee to whom a contesting judgment creditor, who subsequently issued an execution attachment and summoned the trustee as garnishee, had referred the settlement of the matter with the consent of the garnishee and his *cestuis que trust*); *Omaha L. Co. v. Simpson*, 29 Neb. 96 (adjudication in injunction suit is a bar to a counterclaim in an action on the injunction bond); *Bohn v. Hatch*, 133 N. Y. 64 (judgment establishing a lease and lessor's title is a bar to a subsequent attack by lessee upon the validity of the lease).

PETRI AND BROTHER v. FIRST NATIONAL BANK OF FOND DU LAC

[33 TEXAS, 424.]

JURY TRIAL IN CIVIL CASE PROPERLY REFUSED WHEN. — When a suit is brought in May, the defendant answers in the following October, demands a jury at the next April term, but not until the jury docket for the term has been disposed of and the jury been presumably discharged, it is not error for the trial court to refuse to place the cause on the jury docket and allow it to be tried by a jury.

EXCESSIVE JUDGMENT, ASSIGNMENT ON GROUND OF, NOT CONSIDERED WHEN. — The supreme court is not required, under its rules, to consider an assignment of error upon the ground that the judgment is excessive, unless the excess has been called to the attention of the trial court in the motion for a new trial.

NEGOTIABLE INSTRUMENT, PURCHASER OF, MAY RECOVER FACE VALUE OF, WHEN. — The purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity.

McCormick and Spence, for the appellants.

Cobb and Avery, for the appellee.

HOBBS, P. J., Section A. The appellee brought this suit against the appellants, alleging as the cause of action that the C. J. L. Meyer and Sons Co., a corporation, on November 8, 1889, drew a draft on the appellants, requesting them to pay to the order of said Meyer and Sons Co., three months after December, 1889, one thousand dollars, with exchange, etc.; that this draft was accepted by appellants about November 15, 1889, and was transferred for value to appellee by the payee before maturity, etc.; that it was presented at the proper time to appellants for payment, which was refused; whereupon it was duly protested by a notary public for non-payment, the fee for which was \$15.10.

Appellants answered by a general demurrer, general denial, and special plea, alleging that the draft sued on was procured from appellants by the fraudulent representations of the Meyer and Sons Co., and that appellee was not a holder in good faith for value, without notice, etc.

The cause was tried by the court, and on the evidence adduced a judgment was rendered in favor of the plaintiff below, which the defendants have brought before us on appeal.

No motion for a new trial was made in the district court. The evidence supported the allegations in the petition, the

facts showing that appellee acquired the draft before maturity for a valuable consideration, without notice of any defect or fraud, if any, connected with its execution on the part of the Meyer and Sons Co. The plaintiff paid \$924 for the draft, which was a discount of seven per cent on the face of it.

The first error assigned is the refusal of the court to place this cause on the jury docket and allow it to be tried by a jury, when one had been demanded by appellants and the jury fee tendered. The bill of exceptions recites that on March 2d, after the jury docket had been disposed of, and four days before the cause was tried, the defendants demanded a jury, and asked that it be placed on the jury docket, and then tendered the fee, which the court refused, because it would operate to continue the cause.

We can only hold this assignment well taken by indulging the presumption that the court erred in refusing to allow the cause to be tried by a jury, for it does not affirmatively appear from the recitals in the bill of exceptions, as it should to sustain the assignment, that an error was committed. But it is manifest from its language that the demand for a jury was made at a time when the trial of the cause by a jury in the manner prescribed by the statute could not have been had, because the "jury docket had been disposed of for the term"; and the inference is, that the jury had been discharged for the term.

In deciding questions of this character, it has been the leading and proper purpose of our courts to give such construction to the articles of the code regulating jury trials in civil causes as would secure to parties not unreasonably delinquent in complying with the law that character of trial. A failure to demand a jury and pay the fee on the day required by the statute, it has been held, was not of itself sufficient to defeat the right. But it will be generally found, in the cases where this question was decided, that a jury was in attendance upon the court, and that no injury resulting from delay would probably be done the other party.

This suit was brought in May, 1890. The appellant answered in October, 1890. Two terms of the district court had passed after defendant's answer without any demand for a jury, and it was not demanded at the April term, 1891, until the jury docket had been disposed of. These facts, furnished by the record before us, instead of showing the commission of an error, abundantly establish the fact that no error was com-

mitted by the court in the matter complained of: *Cabell v. Hamilton Brown Shoe Co.*, 81 Tex. 104.

The next assignment is, in substance, that the court erred in entering judgment in favor of the appellee for a larger sum than it was shown it had paid for the draft.

The evidence was, that \$924 was paid by the bank for the draft. The amount of the judgment was for the face of the instrument, one thousand dollars, with interest from its maturity, making a difference of about twenty-five dollars, which it is shown by the proof was the usual discount. The effect of the assignment is to complain that the judgment is excessive; and the rule has been heretofore announced by the supreme court, that where the assignment is upon this ground it will not be considered, unless this was called to the attention of the district court in the motion for a new trial: Rev. Stats., art. 1369; *Jacobs v. Hawkins*, 63 Tex. 4. Although we are not required under the rules to consider the assignment, we are clearly of the opinion it is not well taken.

The rule on this subject, declared by the supreme court of the United States, is, that a purchaser of a "negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity." A different rule, it is said, would result in much confusion if *bona fide* purchasers in the market are restricted to their claims upon this class of negotiable securities to the amounts paid by them: *Cromwell v. Sac County*, 96 U. S. 60; *Fowler v. Strickland*, 107 Mass. 554. This does not conflict with those cases where a note is taken and held as a protection against a specified liability, and the recovery is allowed only to the extent of the liability for the protection of which it was taken: *Grant v. Kidwell*, 30 Mo. 455. Nor those cases where a note is deposited as collateral security for a certain sum; nor where the amount paid is so disproportionate that, taken in connection with the purchaser's knowledge of the solvency of the maker, he was held to be a *mala fide* holder: *De Witt v. Perkins*, 22 Wis. 473.

We think the judgment should be affirmed.

EXCESSIVE JUDGMENT. — Objection that verdict gives excessive damages cannot be insisted on in supreme court as ground for reversing the judgment, unless it is made ground by written specification accompanying motion for new trial: *Hillebrand v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757.

NEGOTIABLE INSTRUMENTS — AMOUNT OF RECOVERY BY BONA FIDE PURCHASER. — *Bona fide* purchaser of commercial paper for value may recover the amount of the paper in full, and is not restricted to the amount actually paid by him: *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477. On the other hand, one who takes note as collateral security for pre-existing debt, though a *bona fide* holder for valuable consideration, can recover only amount for which it was held as security: *Citizens' Bank v. Payne*, 18 La. 222; 89 Am. Dec. 650; *Saylor v. Daniels*, 87 Ill. 331; 87 Am. Dec. 250.

HIRSHFIELD v. FORT WORTH NATIONAL BANK.

[83 TEXAS, 452.]

NEGOTIABLE NOTE, WITHOUT GRACE, FALLING DUE ON SUNDAY, DEMAND AND PROTEST, WHEN TO BE MADE. — When a negotiable note, without days of grace, falls due on Sunday, payment thereof cannot be required, nor protest made, on the preceding Saturday, but presentment and protest should be made on the following Monday, unless that is also a legal holiday. The statutes of Texas have not changed this rule.

PROTEST OF NOTE PREMATURE AND WRONGFUL WHEN. — The protest of a negotiable note, without days of grace, falling due on Sunday, is premature and wrongful if made on the preceding Saturday.

WRONGFULLY PROTESTING NOTE BEFORE IT IS DUE GIVES RIGHT TO NOMINAL DAMAGES ONLY. — The mere act of wrongfully protesting a promissory note before it is due gives a right of action for nominal damages only, where no special damages are alleged.

LANGUAGE USED BY NOTARY IN PROTESTING NOTE NOT LIBELOUS PER SE. — The language which a notary usually employs in protesting a note is not libelous *per se*, especially when it appears therefrom that the note was protested before it had fully matured.

DAMAGES FOR MENTAL ANGUISH NOT RECOVERABLE IN ACTION FOR LIBEL WHEN. — Where the libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damages without proof of some other injury or damage.

SPECIAL DAMAGES MUST BE ALLEGED IN ACTION FOR LIBEL WHEN. — In an action for libel, where the words charged are not actionable *per se*, the plaintiff, in addition to an innuendo showing the injurious meaning of the language, should allege some special injury or damage to himself arising as the natural and immediate consequence of its publication.

EXTORTION, TAKING NOTARIAL FEES FOR PREMATURE PROTEST IS NOT. — Where a notary, in ignorance of the law, makes a premature protest of a note, and for so doing takes the ordinary and usual fees charged for protesting, such taking is not extortion within the meaning of the criminal statute, nor can the amount paid be recovered back, the payment having been voluntarily made.

THE plaintiff sued the defendants, alleging in his petition that the defendant bank was a banking corporation, duly incorporated under the laws of the United States, and that defendant Arnold was a notary public for Tarrant County,

and a clerk and employee of said bank; that on the seventeenth day of September, 1890, plaintiff made, executed, and delivered to one J. W. Zook his certain promissory note in writing, in the words and figures following:—

“\$225. FORT WORTH, TEXAS, September 17, 1890.

Sixty days after date, waiving grace and protest, I, or either of us, jointly and severally, promise to pay to the order of J. W. Zook \$225, value received, with ten per cent interest per annum from date until paid, and ten per cent additional for attorney fee if collected by law.

“Negotiable and payable at the City National Bank, Fort Worth, Texas. W. H. HIRSHFIELD.”

That thereafter, and before maturity, said Zook sold, transferred, indorsed, and delivered said note to the defendant bank; that thereafter, to wit, on the fifteenth day of November, 1890, and before the maturity of said note, said defendants, conspiring and acting together, willfully and maliciously, and with gross negligence, illegally protested, and caused to be protested, plaintiff's said note, and made, issued, and uttered, published and circulated, a certain written and printed protest thereof,—setting forth the protest in the usual form; that thereafter, to wit, on the maturity of said note, said defendants, still conspiring together, willfully, maliciously, fraudulently, and with gross negligence demanded, collected, and caused plaintiff to pay them, in addition to the amount of the principal and interest of said note, the further sum of \$3.50, which they then and there claimed and demanded as protest fees, on account of said illegal protest; and plaintiff being then and there ignorant of and unadvised as to their right to collect said money, paid them the same upon their said fraudulent and illegal demand, which sum they converted to their own use and benefit; that plaintiff was, before the acts of the defendants as aforesaid, of good reputation and credit both as a citizen and a business man; that by reason of said illegal, fraudulent, malicious, and grossly negligent acts of defendants, plaintiff has suffered and been damaged in body, mind, reputation, and credit in the sum of fifteen thousand dollars besides and in addition to the damage which he has sustained by reason of being caused to pay said pretended protest fees as aforesaid. Plaintiff further claimed the sum of ten thousand dollars by way of exemplary damages. To the petition the defendant interposed a general demurrer,

which was sustained by the court. The plaintiff declining to amend, the court dismissed the case, and he appealed. The 16th of November was the sixtieth day after the date of the note, excluding the day of the date, but the 16th of November, 1890, was Sunday. Hence the protest on the 15th of November, the Saturday preceding.

Ball, Templeton, and Ball, for the appellant.

Jennings and Lewright, for the appellees.

MARR, J., Section A. If the facts alleged in the petition constitute a cause of action in any view of the case under the law, then it was not subject to the general demurrer.

Was the protest prematurely made, and consequently unauthorized and wrongful? We think so, unless the recognized rule under the law merchant has been changed by our own statutory enactments. There is a conflict of authority, but, as we think, the weight of the authorities and the reasoning support the proposition that in case of a non-negotiable note, or a negotiable one without "days of grace" (like that in hand), falling due, according to its face, upon Sunday, payment cannot be required, nor protest made, on the preceding Saturday. The following Monday is the proper date for presentment and protest, unless that is also a legal holiday. The rule is otherwise where days of grace can be claimed. Sunday, being *dies non*, and not a legal day for exacting payment, all banking business being suspended by law, cannot be computed, except when it is an intermediate day. To do so would make another contract for the parties, and by requiring the defendant to pay on Saturday compel him to meet the obligation before the time for its performance had arrived. Days of grace, however, were originally granted as mere indulgence, and hence the difference in the rules and usages upon this point: *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240, and note; 1 Daniel on Negotiable Instruments, sec. 627; Tiedeman on Commercial Paper, sec. 316; *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530, and note; *Barrett v. Allen*, 10 Ohio, 426; *Kilgore v. Bulkley*, 14 Conn. 363; *Kunts v. Tempel*, 48 Mo. 75.

We are also of the opinion that our statutes have not made any change in the rule upon this subject as above announced. They do not apply to the question in hand, nor prescribe what shall be the practice when the note matures on a Sunday

which is not also a legal holiday. The provisions of the statute, as will be seen upon a close scrutiny, only declare that certain legal holidays shall be treated as the Christian sabbath in regard to the presentment and protest of bills and notes, etc., and that in the event of the occurrence of Sunday and a legal holiday upon the date of the maturity of the paper, then it may be presented or protested upon "the preceding Saturday": Rev. Stats., arts. 2835, 2837. The law as applicable to notes maturing on Sunday alone remains as it was before this enactment. If the legislature had intended to recognize the law as already allowing the protest or presentment upon "the preceding Saturday," then the enactment of article 2835 would have been adequate for that purpose, if such had been the established rule. Article 2837 was therefore enacted to provide for a different state of case.

We conclude that plaintiff's note of hand was prematurely and wrongfully protested, but it still remains to decide whether he has otherwise shown a good cause of action. If he can recover at all (aside from the question of extortion) upon the case as made by the petition, then it must be upon the ground that the acts of the defendant in making and extending the protest of the plaintiff's note of hand, or in uttering and publishing by such means the fact that it had been dishonored, amount to a libel upon his business reputation or commercial credit. He has alleged no special damages, and unless, therefore, the words are actionable *per se*, the demurrer was correctly sustained upon this branch of the case: Odgers on Libel and Slander, secs. 308-310, 313-315; *Bradstreet v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768. The mere act of protesting the note, regarded as a wrongful act, could not give a right of action for more than nominal damages. The substantial damages result, if at all, from the publication of the act or fact of protest; hence the wrong partakes of the character of a libel or slander, and should accordingly be governed by the same principles of law. The decision in *Rolin v. Steward*, 14 Com. B. 594, was based on a breach of contract, though general damages seem to have been allowed after the dishonor of the draft was published: See 3 Lawson's Rights, Remedies, and Practice, sec. 1236. We waive the omission of the plaintiff to allege that he was a merchant or trader, and the absence of any innuendo in this particular (as there was no special exception), though such an allega-

tion is of vast importance: Odgers on Libel and Slander, sec. 63; Cooley on Torts, sec. 202.

We concede, also, that to charge a merchant or trader falsely with being a bankrupt or insolvent, or with dishonesty in his business, whether the accusation or imputation is made in writing or by words of mouth, would present a case where the language should be held to be actionable *per se*, and give a right of action with or without special damages: Authorities *supra*; *Newell v. How*, 31 Minn. 235; 13 Am. & Eng. Ency. of Law, 306, 314, and notes. But we are of opinion that the language contained in the writing or official extension of the act of protesting the note, which is set out in the petition and made the basis of the suit, does not impute, directly or indirectly, insolvency or dishonesty to the plaintiff, or a want of ability or disposition to pay any just debt. It is this writing that the plaintiff alleges the defendants made, uttered, and published concerning himself, and which caused damage to his credit. The writing does not by any means necessarily or naturally have that effect, so that the law would presume damages from its publication. The instrument merely recites that upon the fifteenth day of November, 1890, the notary (who is defendant Arnold), at the request of the other defendant, who was the holder of the note, presented the same during the hours of business to the teller of the bank where the note was payable, and "demanded payment thereof, which was refused"; that thereupon the notary, "at the request" of the holder, "protested solemnly" against the maker and indorser, etc., as is usually done in such cases. Of all of which, according to the instrument, he gave notice, as follows: "To W. H. Hirshfield (maker), by mail; to J. W. Zook (indorser), by mail." This seems to have been the extent of the publication: 1 Daniel on Negotiable Instruments, secs. 939, 940, 950.

The legal effect and the purpose of the protest, as well as the formal notarial attestation thereof, are simply to fix the liability of the drawer or indorser on the bill or note to which he is a party, and to prevent a loss to the owner by reason of the non-acceptance or non-payment, as the case may be, by the maker or drawee. The notary is called upon to witness and attest the essential facts which establish the liability, viz., due presentment and refusal of payment, etc.: 1 Daniel on Negotiable Instruments, sec. 929. We very much doubt that the writing in question is actionable at all. All of its

statements are true, and it does not appear to be defamatory. A copy of the note is annexed to and made a part of it, as set forth in the petition. There is no innuendo, if admissible here, that the intent and purport was to charge the plaintiff with refusing to pay a just debt which had then matured. This conclusion would not naturally be drawn by any one who might read the instrument in connection with the note, and it certainly contains no words to that effect. The reader, presumed to know the law, would see that the protest had been made before the note was due, and hence that the plaintiff had a most excellent reason for not paying it at that time. Let us illustrate. Suppose the defendants had published in a newspaper the statement that the plaintiff had, after demand duly made upon him, refused to pay on the first day of June a note upon which he was duly bound, but which, by its terms, did not become due or payable until the twentieth day of July. That would not be libelous, although the defendants may have been actuated by malice. "Acts which neither the moral code nor the law of the land requires, it cannot be libelous to charge him with not performing": Cooley on Torts, sec. 207; Odgers on Libel and Slander, sec. 308. The damages are not the natural or legal consequences of the language. But we will take the most liberal view in favor of the plaintiff of which the language used will admit, and concede that the ordinary effect or import of such language, in connection with the fact of protest, would be to impute to the plaintiff a failure and refusal to pay his note of hand after it had fully matured. This is certainly as far as the conclusion can be extended, for the language used by the defendants, and by which alone they must be judged, does not affirm the justness or validity of the obligation. The accusation must also be confined to a single note, because they have not said that he refused to meet any other obligation, or was in the habit of refusing to pay his notes. Under such circumstances, we think that it is obvious that the writing is not actionable *per se*. The refusal to pay this particular note may have been justified by sufficient reasons. It may have been an illegal or unjust obligation, or may have already been paid by the plaintiff; hence was allowed to go to protest without any fault upon the part of the plaintiff. We mean by this that the act imputed to the plaintiff was susceptible of the above explanations, and therefore neither the acts nor the language of the defendants necessarily, or in their ordinary

tendency or meaning, charged the plaintiff with insolvency, loss of credit, or with dishonest conduct in business. In such case, the law does not presume an injury to the plaintiff, and allow the recovery of general damages, as when the words are actionable in themselves; for the plaintiff's credit or reputation as a tradesman may or may not have suffered any injury, according to the circumstances, by the publication of such alleged defamatory matter as would not necessarily or ordinarily injure or tend to injure him in these particulars. If it did so injure him in this instance, then the fact should have been alleged, showing the special injury. We are clear, therefore, in the conviction that the writing declared on as a libel is not actionable *per se*, and consequently that the allegations of the petition do not show any right to recover damages for its publication: *Zier v. Hofflin*, 33 Minn. 66; 53 Am. Rep. 9; *Pratt v. Pioneer Press Co.*, 30 Minn. 41; *Newbold v. Bradstreet*, 57 Ind. 38; 40 Am. Rep. 426; Cooley on Torts, secs. 203, 205. Where the libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damages (if recoverable in any case), without proof of some other injury or damage: Odgers on Libel and Slander, 310, and note; Cooley on Torts, sec. 204, and note 3; *Trawick v. Martin Brown Co.*, 79 Tex. 460; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278.

It should, perhaps, also be added, that in Odgers on Libel and Slander (cited above) it is stated, on page 297, that it is not necessary to prove special damages "in any action of libel," from which it might be inferred that such damages need not be alleged in any case of libel. We cannot subscribe to this doctrine. That would abolish the well-recognized distinction, even in cases of libel, between words actionable in themselves and those that are not, and make all libels actionable *per se*. We concede that there may be words used in a published writing or public print, etc., which might be actionable *per se* as libels, when if only spoken they would not be; but still we think that unless the libel is of that class, the plaintiff must, as he would be bound to do in cases of slander under such circumstances, allege, in addition to an innuendo showing the injurious meaning of the language, some special injury or damage to himself arising as the natural and immediate consequences of its publication: Cooley on Torts, secs. 204-206; 13 Am. & Eng. Ency. of Law, 435, note 3; 3 Lawson's Rights, Remedies, and Practice, 2176; *Terwilliger*

v. Wands, 72 Am. Dec. 428, note; *Achorn v. Piper*, 66 Iowa, 694; *Zier v. Hofflin*, 33 Minn. 66; 53 Am. Rep. 9; *Bell v. Print Co.*, 3 Abb. N. C. 157; *Wallace v. Bennett*, 1 Abb. N. C. 478; *Walker v. Tribune Co.*, 29 Fed. Rep. 827.

We now reach the determination of the question, whether the petition shows any right to recover damages on account of the alleged extortion. On this point appellees' counsel say: "We do not think the fees received by the notary were illegal or extortionate in the sense of the criminal statute. They were the ordinary and usual fees charged for protesting, and if the appellant had declined to pay, the notary had no means of compelling him to do so, either by seizing his person or property. The act was purely voluntary and unconstrained on the part of the appellant. It is not even alleged that he paid them under protest, or in any wise signified his unwillingness or objection to do so."

We approve of this position, and hold that the fees, having been paid by the plaintiff voluntarily, with full knowledge of all the facts, and at most only under a mistake of law, cannot be recovered back, unless he is entitled to do so by virtue of our statute, which prescribes a penalty for the benefit of the injured party against the officer for receiving as well as demanding illegal fees under certain circumstances: *City of Houston v. Feesser*, 76 Tex. 365; *Taylor v. Hall*, 71 Tex. 213. Article 2421 of the Revised Statutes extends the penalty only where the officer has demanded and received "higher fees" or "any fee" not allowed by title 42 of the statutes. Under the construction heretofore given to very similar provisions of law by both the supreme court and court of appeals, the acts of the defendants, as shown by the petition, are not within the purview of article 2421, and do not amount to extortion as there defined: *Orton v. Engledow*, 8 Tex. 206; *Hays v. Stewart*, 8 Tex. 358; *Smith v. State*, 10 Tex. App. 413. It is intimated in *Hays v. Stewart*, 8 Tex. 358, that while the fourfold penalty could not be recovered under such circumstances, yet the amount of fees illegally received by the officer might be; but the court did not advert to the effect of a voluntary payment with knowledge of the facts, or to the want of any power in the officer to enforce payment had it been refused. Article 240 of the Penal Code, even as amended, confers no right to recover back the fees when they are such as are prescribed by law for the services performed and have been voluntarily paid; and we conclude, therefore, that the plaintiff, under the

facts stated in the petition, was not entitled to recover as a part of his damages the fees he had paid the notary: *Millar v. Douglass*, 42 Tex. 288; 1 Daniel on Negotiable Instruments, sec. 934.

The decision of this question, where the amount is clearly below the jurisdiction of the district court, is only important, therefore, as affecting the right to recover exemplary damages as claimed in the petition. That character of damages is not recoverable without some actual damage is also shown: *Trawick v. Martin Brown Co.*, 79 Tex. 460; *Flanagan v. Womack*, 54 Tex. 50. The petition, failing to disclose any right to recover actual damages, was insufficient upon the demurrer, and therefore the judgment should be affirmed.

NEGOTIABLE NOTE FALLING DUE ON SUNDAY, WHEN PAYABLE. — If a note which falls due on Sunday has no days of grace, demand for payment cannot lawfully be made until the following Monday, and if made before, is void. If, however, a note is entitled to three days of grace, and the last of these falls on Sunday, the note is payable, and demand for payment may lawfully be made, on Saturday preceding: *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; *Farnum v. Fowle*, 12 Mass. 89; 7 Am. Dec. 35. So where a non-negotiable note, payable sixty days from date, fell due on Sunday, tender on the following Monday was held good: *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240. Similarly, where the third day of grace falls on a public holiday, such as the Fourth of July, demand may be made on the third of that month: *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602. Compare *Sheldon v. Benham*, 4 Hill, 129; 40 Am. Dec. 271.

WORDS INJURIOUS TO A PERSON IN HIS BUSINESS LIBELOUS PER SE: See *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874; *Missouri Pac. R'y Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; *Williams v. Davenport*, 42 Minn. 393; 18 Am. St. Rep. 519; *Moore v. Francis*, 121 N. Y. 199; 18 Am. St. Rep. 810.

ALLEGATION OF SPECIAL DAMAGE, WHEN NECESSARY. — Where the words are libelous *per se*, the declaration need not aver any special damage: *Prior v. Conway*, 134 Pa. St. 340; 19 Am. St. Rep. 704. But in the absence of an allegation of special damage, plaintiff is presumed to rest content with such damages as are the natural result of the libelous publication, without proof of specific facts; and such damages, coupled with damages for the malice with which the article may have been published, are all that he is entitled to recover or prove, unless special damages are alleged: *McDuff v. Detroit etc. Co.*, 84 Mich. 1; 22 Am. St. Rep. 673. See also notes to *Newman v. Stein*, 13 Am. St. Rep. 452; *Bradstreet Co. v. Gill*, 13 Am. St. Rep. 776; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211.

DAMAGES FOR MENTAL ANGUISH, WHEN ALLOWED IN ACTIONS FOR LIBEL: See note to *Terrilliger v. Wands*, 72 Am. Dec. 434, 435. In *Republican Pub. Co. v. Mosman*, 15 Col. 399, it was held that the mental suffering of the plaintiff, caused by the publication of written slander libelous *per se*, may be taken into consideration in awarding general compensatory damages, — that

is, such damages as are commensurate with the loss or injury sustained by him in consequence of the publication.

VOLUNTARY PAYMENT MADE IN IGNORANCE OF PAYOR'S RIGHTS: See note to *Gould v. McFall*, 4 Am. St. Rep. 608. As to when a payment is deemed voluntary, generally, see note to *Cox v. Welcher*, 13 Am. St. Rep. 340.

The decision in the principal case obviously leaves unsettled the very interesting question whether the plaintiff, under the facts set forth, could have recovered if special damages had been alleged and proved. On general principles, it would seem reasonable to suppose that a creditor, who is presumed to know the natural and probable effects of the protest of a note upon the reputation and standing of a trader, should be held liable for all the consequences if the protest is made improperly, even if there is no malice involved. In such a case, the actual contents of the notary's protest are immaterial; it is "the fact of protest," as the court remarks, which is the essence of the injury. If the protest is made in due time, it may damage the person whose note is protested, but the act is a lawful one, and the debtor, not having been punctual in his payments, clearly has no right to complain of any consequences that may follow when his fellow-citizens are informed that he is not able, or has refused, to meet his obligations. But if the creditor undertakes to demand payment before the debt is due, and when the debtor refuses to pay places the refusal on record by a solemn notarial act, he is making an unlawful use of a proceeding sanctioned by the law for a special purpose. Such conduct seems to be in some measure analogous to a malicious prosecution. There the want of probable cause raises a presumption of malice: *Brand v. Hinckman*, 68 Mich. 590; 13 Am. St. Rep. 362; and, in the present instance, that knowledge of the wrongful nature of the act, which must be imputed to the person causing the protest to be made, might fairly be regarded as having the same effect, so far as the defendant's liability is concerned. All the elements for supporting what, under the older systems of pleading, would be a special action on the case seem to be here present, and we are by no means sure that the circumstances would not have been more appropriately discussed without any reference to the peculiar rules of the law of libel. If plaintiff could have shown specifically that damage to his credit had accrued, owing to the act of defendant, why should he have been denied redress if his case was not capable of being brought under those rules? The question would be, not what those who read the protest, or heard of its being made, ought to have thought of the matter, but rather what they would probably think about it; for the impression which would be likely to follow would be the natural consequences of the act for which the defendant, according to the universal principle underlying the law of torts, would be held responsible. The view which the court took of the circumstances rendered it unnecessary to discuss this aspect of the case, but the considerations above suggested seem to indicate that if special damage had been shown, the plaintiff might have recovered. At least the question of liability would then become one of fact, viz., whether, according to the ordinary ideas of the trading community, the protest of a note is likely to impair the maker's credit.

KEATING v. J. STONE AND SONS LIVE-STOCK CO.

[83 TEXAS, 467.]

SHARES OF STOCK IN CORPORATIONS LIABLE TO GARNISHMENT AND EXECUTION. — The statutes of Texas make provision for reaching and subjecting to creditors shares of stock in corporations, both by writs of garnishment and execution.

ANSWER OF CORPORATION GARNISHED TO STATE NUMBER OF SHARES OWNED BY DEBTOR. — Where a corporation is the garnishee, it is required by the writ to answer what number of shares, if any, the debtor owns in the company, and the shares so ascertained, or so much thereof as may be necessary, may be ordered to be sold to satisfy the judgment rendered.

EXECUTION, SHARES OF STOCK CANNOT BE SOLD UNDER, WITHOUT DESCRIPTION. — When the law gives to the creditor a process by garnishment through which he may reach the shares of stock in a corporation owned by his debtor, and get a sufficient description of them, and then have them sold under execution to satisfy his debt, he cannot be allowed to proceed by execution in the first place without any description.

OFFICER LEVYING EXECUTION ON SHARES OF STOCK MUST ASCERTAIN NUMBER OWNED BY DEBTOR. — If an officer having an execution can ascertain the number of shares of stock in a corporation owned by the debtor, he may levy his execution upon so many of them as may be proper to satisfy it, but without such knowledge he cannot make a lawful levy or sale. A levy and sale of "all the shares of stock owned and belonging to" the execution debtor, and "all his right, title, and interest of, in, and to said shares of stock," no effort by garnishment having been made to ascertain the number of shares owned by the defendant, are void, and confer no title.

George H. Plowman, for the appellant.

U. F. Short and N. G. Turrey, for the appellees.

HENRY, A. J. The appellant, claiming to own shares of stock in the J. Stone and Sons Live-stock Company, a corporation, brought this suit for a writ of injunction, a receiver, and an account.

The court charged the jury to find for the defendants, and the case is before us on bills of exception to the exclusion of the evidence offered by the plaintiff to prove that he was a stockholder in the corporation.

It appears that Keating had recovered a judgment in the district court against John Stone, who owned a large number of the shares of stock of the corporation. Stone was absent from the state, and the plaintiff in the judgment made diligent inquiry of the officers and stockholders of the corporation, to ascertain what interest in it was owned by Stone, but he failed to get any information on the subject. An execution was issued on the judgment, which the sheriff attempted to levy upon Stone's shares in the corporation by giving notice as prescribed

by the statute, under which he made a sale and conveyance to Keating of said shares.

The description of the property sold, contained in the sheriff's return and conveyance, was as follows: "All the shares of stock owned and belonging to the said John Stone in said J. Stone and Sons Live-stock Company, and all the right, title, and interest which the said John Stone had on the twelfth day of June, A. D. 1886, or at any time afterward, of, in, and to the said shares of stock."

The proceedings were in other respects regular, and such as would have vested title in the purchaser under a lawful levy and sale. The conveyance and other proceedings under the execution were offered in evidence by the plaintiff, but were excluded upon objection made by the defendants, on the ground that they were "void, because they did not describe any number of shares of stock, nor sufficiently designate any property."

The Revised Statutes make provision for reaching and subjecting to creditors shares in corporations both by writs of garnishment and execution. These provisions were taken from the original act, approved March 13, 1875, which was entitled "An act to provide a mode for the sale of shares in any joint-stock or incorporated company on execution." The first seven sections provided for reaching such shares by garnishment, both before and after judgment. In them very particular directions are contained in regard to the number of shares to be condemned and sold, as well as to the description of them in the judgment, so as to limit such sale, and prevent the disposal of more than are required to satisfy the judgment. The eighth section of the act merely declares such shares to be "subject to execution in the same manner as other personal property is liable to execution by the laws of this state."

The Revised Statutes direct that when the garnishee is a corporation, the writ of garnishment shall direct it to answer "what number of shares, if any, the debtor owns in such company": Art. 199; and that the court, if it renders a judgment against the garnishee, shall order the sale of the whole interest of the debtor, "or so much thereof as may be necessary to satisfy such execution": Art. 208. With regard to executions, they contain but two provisions on the subject, which read as follows:—

"Art. 2297. Shares of stock in any joint-stock or incorpo-

rated company may be sold on execution against the person owning such stock."

"Art. 2294. A levy on the stock of any corporation or joint-stock company is made by leaving a notice thereof with any officer of such company."

At common law, corporate shares were not subject to levy and sale upon execution. In some states, the means by which the officer making the levy may ascertain the number of shares owned by the debtor is prescribed by statute: *Blair v. Compton*, 33 Mich. 414; *People v. Goss etc. Mfg. Co.*, 99 Ill. 355.

In Connecticut, a levy describing the number of shares levied upon was held to be sufficient: *Stamford Bank v. Ferris*, 17 Conn. 268.

The case of *O'Brien v. Mechanics' etc. Ins. Co.*, 56 N. Y. 52, is cited as authority that the levy of an execution upon shares of stock by a general notice showing that it is made upon the entire interest of the debtor, without mentioning the number of shares, is sufficient. That case arose upon the service of a notice of attachment under the New York code, and not upon the levy of an execution. In the opinion it is said: "The sheriff, by his action and the notice he gives, acquires no actual dominion over the property. It is as much beyond his personal control as before the levy; and there is no particular magic in the act of giving the notice that affects the *status* or the rights of any one, save as prescribed by statute, or changes the character or actual condition or possession of the property. The notice is but an act of caution to the individual upon whom it is served, intended and operating solely to prevent his paying the debt or delivering the property to the debtor, and impounding it to answer the judgment. A particular description of the property and debts supposed to be in the possession of or owing by the individual served is not necessary for the information of the party served, and would not more satisfactorily show to him the property intended to be reached. The individual served necessarily knows better than the officer can know the property and debts in his possession or owing by him subject to attachment. If a case could be supposed in which a party could be misled and injured by the generality of a notice of this kind, it might be different."

A levy and sale under an execution is quite a different thing. If in that proceeding no mention of the number of shares is required, then there would be nothing to prevent an

excessive levy, and a very large estate might be sold to satisfy a very small judgment; and that, too, when the property was capable of division. It would lead to a sacrifice of the interests of both the debtor and the creditor, resulting from the fact that what had been seized and was being sold might be entirely unknown to the bidders.

There should be no such uncertainty attending execution sales when it can be avoided, and it should be very clear that the legislature so intended before any statute should be given such a construction. The fact that we have a statute providing for the sale under execution of a partner's interest in partnership property, and that in some other cases undefined interests of the debtor may be sold, is not a sufficient reason for pursuing the same practice in all cases, nor in the present instance.

In the case of partnership property there exists no means by which the interest of one of the partners can be determined until the business of the partnership has been wound up. In other cases, upon the facts given by the officer, the required information may be usually ascertained, and the law does not furnish in such cases any other process through which the property may be reached by a creditor.

The case of *Bourcier v. Edmondson*, 58 Tex. 675, is not in point. In that case a landlord filed his petition to foreclose his landlord's lien upon what was described in his petition as "a large quantity of household furniture and other personal property placed by Mrs. Bourcier on said premises, owned by her and now on said premises." It was further alleged that the plaintiff was unable to describe the property more particularly. It was objected that the description of the property was not sufficient to authorize a foreclosure. In the opinion it was said: "The description of the property is rather vague, both in the petition and the judgment. But in such cases it must necessarily be so. The landlord has not such access to the premises as would enable him to make an inventory of the household and kitchen furniture of the tenant. In *Messner v. Lewis*, 20 Tex. 222, which was the case of an attachment lien upon 'a stock of goods and merchandise,' of which no other and better description was given in the sheriff's return, this court held the return insufficient, because it was in the power of the party executing the writ to enter a store of a third person where the goods of the defendant were, and remain there long enough to seize, secure, and

inventory them. Unless such inventory can be made, the best description of it is the general statement, which will comprehend all of the household and kitchen furniture on the place. This is more especially the case where no seizure of the property under summary process is sought. While it might be necessary to point out with some degree of certainty to the officer the property which he is to take possession of under such stringent writ, no special necessity for this could exist where it is left with the owner until the lien is foreclosed. Proof to identify it could be made on the trial, and a judgment rendered that would enable the sheriff to seize it under execution."

The opinion then proceeds to demonstrate that the judgment did sufficiently describe the property to be sold to enable the sheriff to identify it.

The opinion and the case in it cited clearly hold that a description that fails to identify the property levied upon will not be held sufficient when it is in the power of the sheriff to get a proper one. May it not be equally well said, that when the law gives to the creditor a process by garnishment through which he may reach the shares of stock and get a sufficient description of them, and then have them sold under execution to satisfy his debt, he should not be allowed to proceed by execution in the first place without any description? We think it may. It is "shares of stock" that the Revised Statutes declare may be sold on execution, thus recognizing the usual division and description of a share-holder's interest in a corporation. The interests of the owners of such stock are divided into shares, to make them capable of subdivision, and all transactions of the owners are had with them in that way. If by any proper means the officer who levies the execution can ascertain the number of shares owned by the debtor, we have no doubt about his authority to levy an execution upon so many of them as may be proper to satisfy it, as in other cases, in the manner directed by the Revised Statutes; but when he neither possesses nor can acquire such knowledge, we do not think he can make a lawful levy or sale. There having been no valid levy or sale, the plaintiff could not subsequently supply their place, or acquire a right to recover the shares by proving other facts; and as the views expressed by us are decisive of the case, we deem it unnecessary to consider other objections.

The judgment is affirmed.

CORPORATE STOCK — LIABILITY TO GARNISHMENT. — Under the Rhode Island statute, corporate stock is liable to attachment: *Beckwith v. Burroughs*, 14 R. L. 366; 51 Am. Rep. 392; but not an equitable or executory interest in corporate stock: *Lippitt v. American Wood Paper Co.*, 15 R. L. 141; 2 Am. St. Rep. 886. Attachment of shares of bank stock by the bank, after notice of an assignment of the shares, made without a transfer on the books of the bank, is ineffectual to defeat the prior right of the assignee: *Teague v. Le Grand*, 85 Ala. 493; 7 Am. St. Rep. 64.

DESCRIPTION OF CHATTELS LEVIED UPON. — Sheriff cannot levy upon the stock of a bank by merely entering upon an inventory of the property levied upon "six shares capital stock," without informing the defendant that he had levied upon his stock, or seeking a delivery over of his certificate: *Princeton Bank v. Croser*, 22 N. J. L. 383; 53 Am. Dec. 254. A description in general terms of bricks levied on in a kiln, among a larger number, is sufficient to authorize a sale under the levy, where the description was "three thousand bricks on the lot of the defendant": *Hill v. Harris*, 10 B. Mon. 120; 50 Am. Dec. 542. A levy on "one saw-mill engine and fixtures, situated at Gordoma on the Brunswick railroad, on lot of land number ninety-one, in the seventh district of said county, and all of the lumber now in the yard of said saw-mill," is sufficiently certain and specific: *Bennett v. Gray*, 82 Ga. 592. But a levy on "one hundred bales of cotton, more or less," in the absence of a more exact description, "would seem to be too indefinite and uncertain": *Bolling v. Vandiver*, 91 Ala. 375. As to what is a sufficient levy on personalty, see note to *Sawyer v. Bray*, 11 Am. St. Rep. 716. In Texas, express statutory provision has been made to meet the exceptional case of a levy upon live-stock running on ranges: See *Gunter v. Cobb*, 82 Tex. 596.

TEXAS AND PACIFIC RAILWAY COMPANY v. BRICK.

[83 TEXAS, 526.]

RECEIVER — RAILWAY IN HANDS OF, LIABLE FOR INJURY TO EMPLOYEE.

— A railway company is liable for damages for personal injuries inflicted upon an employee, by reason of negligence, while the road was in the hands of a receiver, where the road has been returned to the company improved by the expenditures made by the receiver.

EMPLOYER OF MINOR WITHOUT PARENT'S CONSENT LIABLE FOR INJURY TO HIM WHEN.

— One who employs a minor, knowing him to be such, in a dangerous business, without his father's consent, becomes liable to compensate the father for any loss of the son's service during minority which may result from an injury suffered in that business; and no question of contributory negligence, or as to whether the injury resulted from the negligence of the minor's fellow-servants, can arise in such case. The father is a stranger to the contract of employment, and is not bound by any of its terms.

MEASURE OF PARENT'S DAMAGES FOR LOSS OF HIS CHILD'S SERVICES.

— The measure of a parent's damages for injuries to his child, resulting in loss of service to him, is the amount which the child would have earned during his minority if the injuries had not been inflicted. The board of the child should not be deducted from that amount.

VERDICT NOT EXCESSIVE WHEN.

— A verdict of twelve hundred dollars re-

covered by a father for injuries to his minor son lacking a few days of being nineteen years old when the accident occurred, the injuries consisting of the permanent and serious impairment of the right arm and the loss of a foot, is not excessive.

Finch and Thompson, for the appellant.

Ball, Wynne, and McCart, for the appellee.

GAINES, A. J. The appellee brought this action to recover of appellant damages for the loss of the services of his minor son. The suit was brought in the first instance against John C. Brown as receiver of the property of the appellant company; but in amended petition the company was made a party; and it was averred that Brown had been discharged as receiver; that all its property had been turned back to it by the court with betterments of the value of millions of dollars placed thereon by him from its net income during his receivership. The original ground of action was, that without the consent of the plaintiff, his minor son had been employed by an agent of the receiver to work at the dangerous occupation of brakeman in the company's switch-yard, and that while so employed had suffered injuries which rendered him unable to earn a livelihood.

That the company was liable under the circumstances for the damages accruing from the wrong alleged is not an open question in this court: *Texas etc. R'y Co. v. Comstock*, 83 Tex. 537; *Boggs v. Brown*, 82 Tex. 41, and cases there cited.

The appellant requested the court to charge the jury to the effect that the plaintiff could not recover if his son was guilty of negligence which contributed to the injury; and also that he could not recover if the accident was the result of the negligence of the son's fellow-servants. Both instructions were refused, and in this action of the court there was no error. In *Gulf etc. Railway v. Redeker*, 67 Tex. 190, 60 Am. Rep. 20, the rule was clearly recognized, that one who employs a minor, knowing him to be such, in a dangerous business without the father's consent becomes liable to compensate the father for any loss of the son's service during minority which may result from an injury suffered in that business. That case was reversed solely upon the ground that the charge authorized a recovery without reference to the question whether the employer knew of the minority or not. The decision of the supreme court of Kentucky in *Louisville etc. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, cited in the Redeker case

from a *syllabus* in the Central Law Journal, is now before us, and fully sustains the doctrine of the employer's liability in such cases. The contract of employment with the minor having been made without the consent of the father, the latter is a stranger to it, and is not bound by any of its terms. He does not agree that as between himself and the employer the son shall be bound to take the risk directly incident to the employment, or that which may result from the negligence of the son's fellow-servants. His ground of complaint is, that the employer has engaged the son in a dangerous occupation, where, by reason of the dangers attending the business, either naturally arising from it or from the negligence of employees, he has lost the son's services; and in our opinion, he is entitled to recover for any loss resulting from such dangers, without reference to the question whether the son has contributed to such injury or not, provided the loss has resulted from the perils of the occupation. The wrong to him consists in the unauthorized employment, and he is entitled to compensation for any loss which has resulted from that wrong.

The case of *Texas etc. R'y Co. v. Carlton*, 60 Tex. 897, was a suit by the father to recover damages for injuries resulting in the death of the son, under our statute. The statute gives an action in cases only where the deceased, if living, could have recovered for the injury.

It is also complained that the verdict for twelve hundred dollars is excessive. The evidence showed that the plaintiff's son, at the time of his injury, was receiving as wages sixty-five dollars per month. Before that he had been employed in an occupation not attended with any peculiar danger, in which he received fifty-three dollars per month. At this latter time he lived with his father. There was also evidence tending to show that since the injuries had been inflicted he had not been able to procure employment. His right arm was seriously and permanently impaired, and he lost a foot as the result of his injuries. He lacked a few days of being nineteen years old when the accident occurred. We think the evidence sufficient to support the verdict. It may be conceded, as appellant claims, that his earning capacity in a dangerous business is not the true criterion of the value of his services, so far as the suit of his father is concerned. The contention then is, that from his wages his board should be deducted, and that so considered, the net result of his services for two years and twelve days would not amount to the sum

found by the jury. But should the board be deducted? While the father is entitled to the son's services, he is equally bound to support him during his minority, and hence the gross amount that the son could have earned is the measure of his loss. Although, as the evidence shows, he may have allowed the son to spend his earnings before the injury, he was none the less entitled to them both before and after the accident; and under the circumstances of this case, his recovery can only be restricted to the amount the son may have earned before attaining his majority had not the accident occurred.

We find no error in the judgment, and it is affirmed.

LIABILITY OF RAILROAD COMPANY FOR ACTS OF RECEIVER. — This subject is discussed in *Texas etc. R'y Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60, and note; *Texas etc. R'y Co. v. Griffin*, 76 Tex. 441; *Texas etc. R'y Co. v. Miller*, 79 Tex. 78; 23 Am. St. Rep. 308; *Texas etc. R'y Co. v. White*, 82 Tex. 543. See also extended note to *Nagles v. Alexandria etc. Co.*, 5 Am. St. Rep. 313-316. Where a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, such corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver: *State v. Wabash R'y Co.*, 115 Ind. 466.

MEASURE OF DAMAGES FOR LOSS OF SERVICES OF MINOR CHILD. — Parent may recover not only for loss of service, the result of the injury, up to the time of the trial, but also for the prospective loss during the child's minority; and also for expenses actually and necessarily incurred, or which would be immediately necessary in consequence of the injury, in the care and cure of the child: *Dollard v. Roberts*, 130 N. Y. 269.

LIABILITY OF EMPLOYER TO PARENT OF INJURED MINOR SERVANT. — Where the master knowingly engages a minor in a dangerous employment, without the father's consent, and the minor is injured in such employment, the master is responsible to the father for the loss of his son's services resulting from such injury: *Gulf etc. R'y Co. v. Redeker*, 75 Tex. 310; 16 Am. St. Rep. 887. At common law, if the father consented to the employment of his minor son in a dangerous service, and the son had arrived at the age of fourteen years, each of them assumed the risks incident to the service, and neither could maintain an action against the employer on account of personal injuries to the minor, resulting from the negligence of another person employed in the same service; and this rule is not altered by the Alabama code: *Lovell v. De Bardeleben Coal and Iron Co.*, 90 Ala. 12.

MAYOR ETC. OF CITY OF HOUSTON v. HOUSTON CITY STREET-RAILWAY COMPANY.

[33 TEXAS, 543.]

DEMURRER DEEMED WAIVED WHEN. — Where a general demurrer has not been acted upon by the court nor called to its attention, it should be deemed to have been waived.

GRANT OF FRANCHISE TO STREET-RAILWAY COMPANY NOT EXCLUSIVE. —

A grant by a city to a street railway company of a right to construct and maintain a street-railway along and upon its streets does not confer an exclusive privilege, nor prevent the city from extending similar privileges to other railway companies. Subject to the right of the railway company to an easement in the streets to the extent to which the streets are occupied for that purpose by its tracks, switches, and turnouts, the city's dominion over the streets remains unchanged and unimpaired, and is as full and complete for all purposes as it was before the grant was made. Such a grant is not, therefore, void on the ground that it confers an exclusive privilege.

AUTHORITY TO GRANT STREET-RAILWAY FRANCHISE AND EXTEND IT FOR TERM OF YEARS. —

The legislature, by providing in the act chartering a street-railway company "that all contracts made and entered into by and between the mayor and aldermen of the city of Houston and the said company, or any privileges or rights granted by the said mayor and aldermen of the city of Houston to the said company, shall be in all respects legal and binding on the aforesaid contracting parties," and in the charter of the city that "the city council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts, and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets; to control and regulate everything concerning street-railways," — clearly intended to confer and did confer upon the city council ample authority to grant a franchise to the street-railway company, and to extend it for a term of years.

VESTED RIGHT, GRANT OF FRANCHISE FOR STREET-RAILWAY BECOMES,

WHEN. — When the grant to a company of a street-railway franchise has been duly accepted and acted upon by the company, it becomes a vested right or perfected contract which cannot be subsequently repealed or impaired by the body or authorities that made it, provided there is no constitutional prohibition to the granting of such special privileges by the legislature or under its authority.

DURATION OF FRANCHISE, BY WHOM DETERMINED. —

Where the common council of a city has legislative authority to grant a street-railway franchise, the time for which it may be granted is a matter for its exclusive determination.

CONSTITUTION DOES NOT LIMIT DURATION OF STREET-RAILWAY FRANCHISE.

— While section 7 of article 10 of the constitution of Texas is entirely prohibitory, and not permissive, still it is a clear recognition of the right of any city to give its consent to the use of its streets by street-railway companies, and it contains no limitation of the length of time for which such consent may be given.

H. F. Ring, city attorney, for the appellant.

Jones and Garnett, for the appellee.

MARR, J., Section A. This suit was brought by the Houston City Street-railway Company, to enjoin the city of Houston from interfering with the laying of a street-railway track by appellee on one of the streets of said city. A temporary injunction was issued, which on final hearing was perpetuated by the decree of the court, from which action of the court, in refusing to dissolve the injunction and in perpetuating the same, this appeal is taken.

Appellant's only assignment of error is as follows: "The court erred in rendering judgment against defendant, and in behalf of the plaintiff, and in failing to render judgment in favor of the defendant, because the charter of the city of Houston never authorized, nor was authority ever conferred by the legislature upon, defendant's council to grant any special franchise or privilege of any character whatsoever in the use of the streets of said city of Houston for a term of years; and because the evidence showed that plaintiff had no right to use for street-railway purposes the portion of the street in question, after being notified of the passage of the ordinance of date July 28, 1890, repealing the first section of the ordinance of date August 12, 1889, mentioned in plaintiff's petition; and because no grounds whatsoever existed for the equitable interposition of the court."

Appellant's first proposition under the above assignment of error is as follows: "Authority never having been conferred upon said council to grant special franchises to private persons or corporations of any character whatsoever in the use of the streets of said city of Houston for a term of years, so much of the ordinance under which the appellee claims a franchise for a term of years was void, and subject to amendment or repeal at any time by the city council."

By his second proposition under the above assignment, the counsel for appellant contends that the ordinance passed by the city council, and "under which the plaintiff claims a franchise for thirty years, is unreasonably broad and comprehensive, and for this reason is void, even if the city council had authority from the legislature to grant special privileges in the streets to corporations for a term of years, . . . and therefore any subsequent city council had authority to repeal such privilege at any time."

This proposition is scarcely embraced by the assignment of error, but we will notice the questions in their order. It appears that the city council, by an ordinance passed July 28, 1890, attempted to repeal or annul the franchise or privilege of the plaintiff in so far as it had been previously authorized to construct its road "on Congress and Louisiana streets, between Travis Street and a connection with its Glenwood line on Fifth Street"; and that while plaintiff was proceeding to make, and was in the act of making, such "connection," as above described, by the construction of the necessary line of railway, etc., the city officials, in virtue of said repealing ordinance, immediately upon its passage, notified plaintiff thereof, interfered with the further prosecution of said work, and forcibly prevented the plaintiff from building and completing said line of railway upon said streets, and from making said connection with its other line.

These acts of the city council and the city officers are made the basis of the suit for injunction. We may remark in this connection that the question of the right of the plaintiff to an injunction is not properly presented in this case. The defendant filed only a general demurrer to the petition, and the record fails to show that it was called to the attention of the court below. It was not acted upon by the court, and should therefore be deemed to have been waived. It is unnecessary, under such circumstances, to enumerate the allegations of the petition upon which the plaintiff relied for equitable relief. We may, however, say generally, that the facts alleged would indicate that the plaintiff might suffer irreparable injury unless the defendant should be duly restrained by the process of the court: *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342. The original grant of the franchise to the plaintiff by the city of Houston was by an ordinance of its common council passed on the fifth day of November, 1883. The provisions of this enactment, so far as need be quoted, are as follows:—

"1. That the right of way is hereby granted to the Houston Street-railway Company, organized under a charter passed by the legislature of the state of Texas on the sixth day of August, 1870, with the privilege of laying, using, maintaining, and operating a single or double track street-railway, and all necessary side-tracks, turnouts, turn-tables, and switches, for the purposes and uses for which this grant is made, through and over any and all streets of the city of

Houston, and the bridges thereon, including the bridges crossing Buffalo and White Oak bayous, which may be owned by the city of Houston, excepting that portion of Main Street south and west of Capitol Street, and that portion of Franklin Street east of San Jacinto Street, which portions of said streets are hereby reserved from this grant."

The sixth section of said ordinance is as follows: "That the using of any of the streets of Houston by said street-railway company after the passage of this ordinance, for any of the uses and purposes specified in this ordinance, shall be deemed an acceptance of the grant therein made, and an acceptance of the terms and conditions herein imposed, which said grant is to be used and enjoyed by said company; that said railway company shall avail itself of this grant of right of way within two years from the passage of this ordinance."

Section 7 of said ordinance is as follows: "That said street-railway company, complying faithfully with the terms and conditions imposed by this ordinance, and the provisions of the charter of the city of Houston, as required by the city council, shall have and enjoy the rights, powers, and privileges herein granted and conferred for a term of thirty years from and after the passage of this ordinance."

It is agreed and admitted by the parties that the plaintiff accepted the franchise granted by the city within due time, and has fully complied with all of the terms and conditions of the grant; that it has, in accordance with the rights and privileges granted, "constructed, equipped, and put in operation on the streets of said city fully fourteen miles of its street-railway, and in accomplishing this result has expended over \$75,000," etc. These things were all done by the plaintiff prior to January 1, 1888.

It may be observed at this point of the investigation that the franchise or privilege granted to the plaintiff by the city of Houston, though it extends to nearly all of the streets of that city, is not of an exclusive character. The city, by the terms of the grant, is not prohibited from extending similar privileges to other railway companies. This view of a similar grant was directly announced by the supreme court in the case of *Gulf City St. R'y Co. v. Galveston City R'y Co.*, 65 Tex. 502, and it was further held, that, subject to the right of the railway company to an easement in the streets to the extent in which the streets were occupied for that purpose by its "tracks, switches, and turnouts," the city's "dominion over

the streets remained unchanged and unimpaired, and was as full and complete for all purposes" as it was before the extension of the grant. Such, at least, is the effect of the decision then made, and it coincides with our own views of the question. The grant to the plaintiff as extended by the city of Houston is not therefore void upon the ground that it confers an exclusive privilege, as it would have been under the constitution if it had in fact created a monopoly in favor of the plaintiff: *City of Brenham v. Brenham Water Co.*, 67 Tex. 542.

Upon the twelfth day of August, 1889, the city council (for some reason which is not very apparent to us) passed an additional ordinance, which gave its permission to the plaintiff "to build and operate its street-railway" upon a number of the streets of the city, including the right upon the part of the plaintiff to establish the "connection with its Glenwood line on Fifth Street," as before described. This ordinance did not specify the duration of the privilege granted, but it was enacted "subject to the terms and conditions of the original ordinance of November 5, 1883," etc.

It was this ordinance of August, 1889, which the city council attempted to repeal, as before stated, in July, 1890. This the appellant claims the city had the lawful right to do, because the ordinance of 1889 did not extend the privilege for any definite length of time. We think that this position is of no consequence as affecting the merits of the controversy, if the right of the appellee to the exercise of its franchise had become vested and irrevocable before the expiration of the term, by reason of the original contract between the parties made or created in pursuance of the ordinance of November 5, 1883.

Whether the privileges originally granted to the plaintiff had become perfect or vested rights which the city could neither impair nor take away must of course depend in the first place upon the validity of the original ordinance of November 5, 1883. It is claimed by the appellee that the city council possessed adequate authority to enact this ordinance, not only under the charter of the city, but also by reason of express authority to that effect as contained in the act of the legislature incorporating the plaintiff company. The charter of the plaintiff, which was granted by the legislature upon the sixth day of August, 1870, contains, among others, the following provisions:—

"Sec. 8. That all contracts made and entered into by and between the mayor and aldermen of the city of Houston and the said company, or any privileges or rights granted by the said mayor and aldermen of the city of Houston to the said company, shall be in all respects legal and binding on the aforesaid contracting parties."

Section 9 of said act of incorporation provides **"that this charter shall remain in full force and effect for the period of fifty years."**

The object of the legislature in incorporating this company was to enable it to build a street-railway in the city of Houston, and section 8 of the above charter was evidently intended by the legislature to confer upon the city government plenary powers at least to make any contract (otherwise valid) with this company in reference to the establishing and constructing of its street-railway, and in express terms contemplates the granting, upon the part of the city, by contract or otherwise, the necessary "rights or privileges" to effectuate this purpose: *Covington Street R'y Co. v. City of Covington*, 9 Bush, 127. We also find in the charter of the city of Houston, which was in force when the ordinance of November 5th was passed, the following provisions: —

"The city council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts, and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets; to control and regulate everything concerning street-railways," etc.

We are of the opinion that by the terms of both of these charters (clearly by that of the street-railway company) the legislature intended to and did confer ample authority upon the city council to grant the franchise in question to the plaintiff, and to extend it for a term of years, as it did do. We also think that, according to the current of the authorities, the grant, having been duly accepted and acted upon by appellee, became a vested right or perfected contract, which could not be subsequently repealed nor impaired by the common council or the authorities of the city of Houston; provided, however, that there is no constitutional prohibition to the granting of said special privileges by the legislature or under its authority: *Rio Grande R. R. Co. v. City of Brownsville*, 45 Tex. 96; 2 Dillon

on Municipal Corporations, 3d ed., sec. 727; 1 Dillon on Municipal Corporations, 3d ed., sec. 314; *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *Birmingham etc. R'y Co. v. Birmingham R'y Co.*, 79 Ala. 465; 58 Am. Rep. 615; *Milhou v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *City of Burlington v. Burlington Street R'y*, 49 Iowa, 144; 31 Am. Rep. 145; *Dartmouth College Case*, 4 Wheat. 519; *Fletcher v. Peck*, 6 Cranch, 137; *Stein v. Mayor*, 49 Ala. 362; 20 Am. Rep. 283; *International etc. R'y Co. v. Anderson County*, 59 Tex. 667; Const., art. 10, sec. 7. Those decisions cited by counsel for the appellant which deny the power of the city government, under its general authority over its streets, to grant the right to operate a street-railway in such streets for private gain, were rendered in cases where the legislature had not conferred upon the municipality the necessary authority to extend such franchise.

In reference to the second proposition submitted by the appellant, we hold that as the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination. Whether it should be extended for two, five, or thirty years was left to their wisdom and discretion. They could not, perhaps, abandon or transfer the ordinary control over the streets, of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office; but this, as we have seen, they did not do. Nor was it in the power of the common council to create a perpetuity. Subject to these limitations, however, the wisdom and reasonableness of the grant and the length of time during which it should continue was addressed solely to the good judgment of the members of the common council: 1 Dillon on Municipal Corporations, sec. 95. There is no pretense in this case that the use of the streets by the plaintiff has become a nuisance or amounts to an injury to the public, so we need not go into that branch of the subject: *City of Burlington v. Burlington Street R'y*, 49 Iowa, 144; 31 Am. Rep. 145.

While section 7 of article 10 of the state constitution is entirely prohibitory, and not permissive, still it is a clear recognition of the right of any city to give its consent to the use of its streets by street-railway companies, and it contains no limitation of the length of time for which such consent may be given.

We might end the discussion here, and affirm the judgment

of the district court. But there is another provision of the constitution of 1876 which may have some bearing upon the power of the legislature, or any municipal government under its authority, to create for a definite period any "irrevocable or uncontrollable grant of special privileges," like the franchise granted to the plaintiff: Bill of Rights, sec. 17. This provision has not been invoked nor cited by counsel for the appellant, nor has it been discussed by counsel for either party. It is claimed, however, by the appellant, as already stated, that even if the legislature had conferred authority upon the common council of the city of Houston to grant special privileges to corporations for a term of years, still the ordinance of November 5, 1883, which extended the franchise for the period of thirty years, would be void, because "unreasonably broad and comprehensive." This proposition most evidently does not directly present the question of the constitutionality of the ordinance in question.

We are loath to decide a constitutional question when it has not been directly raised and argued by counsel; yet we do not see how it can be ignored entirely. That the question is indirectly involved there can be no doubt, for the reason that although the plaintiff's charter was granted before the adoption of the present constitution, still the rights claimed in this suit had not become vested, nor was the franchise granted by the city until long after the constitution had gone into operation: *Mississippi Society v. Musgrove*, 44 Miss. 820; 7 Am. Rep. 723.

The article of the constitution above cited reads as follows: "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." There is no doubt that the franchise as granted to the plaintiff is, in legal acceptation, "a special privilege": *Bank of Augusta v. Earle*, 13 Pet. 595; *Birmingham etc. R'y v. Birmingham S. R'y Co.*, 79 Ala. 474; 58 Am. Rep. 615; *Milham v. Sharp*, 27 N. Y. 619; 84 Am. Dec. 314; 3 Kent's Com. 458.

What, then, is meant by the other words, "irrevocable or uncontrollable grant"? This question is by no means of easy solution, and may possibly be understood in a different sense by different minds, or may give rise to diverse impressions in the same mind.

1. The decision of the supreme court of the United States

in the celebrated Dartmouth College case, where it was declared that a franchise, upon being accepted by the grantee, became a perfect contract, which the state could neither recall nor in any wise impair, has never been universally admitted to have been based upon sound principles of government. Many eminent writers and courts have thought that a franchise is a mere privilege extended by the sovereign power of the state, which it could recall whenever it should be deemed advisable so to do. The courts have generally, however, from necessity, yielded to the supreme court of the United States, but many have done so, if not sullenly, under apparent protest: Cooley on Constitutional Limitations, 341, 342, and note 1. The pernicious and evil consequences of that decision have been frequently pointed out by judges and law-writers, and the doctrine announced has never been cordially accepted by those who believe in the sovereign power of the state: Cooley on Constitutional Limitations, 340, and note 2. May not, therefore, the framers of our constitution have intended by this provision to render impotent and inapplicable the principle announced in the Dartmouth College case, not only as to perpetuities, but as to franchises for a term of years? *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342. Did they not mean to say to the legislature, "You may extend special privileges to corporations, but the right to recall the grant whenever you may deem it advisable is reserved and shall be an indispensable condition of the grant"? If so, the grantee would of course acquire the franchise subject to this reservation and condition, and it could be revoked or withdrawn by the power which extended it, whether that was the state legislature or a municipality acting under the authority of the legislature. In many other provisions of the constitution we also observe evidence of great jealousy of corporate powers and franchises upon the part of the framers of that instrument: Arts. 10-12. Then, again, there was the celebrated subsidy to the International and Great Northern Railway Company, including an "immunity" from taxation for twenty-five years, which had but recently, by an "irrepealable contract" been granted, and perhaps was in the mind of the convention. Generally, when it is said that a power is "irrevocable," we understand that the grantor cannot withdraw nor call back the power.

2. But the word "irrevocable" is frequently used in a somewhat different sense. It may mean a thing or denote a

right or power which cannot be annulled or vacated except for a sufficient cause. It may mean unalterable or irreversible. To revoke sometimes denotes the right to annul, rescind, or abolish: Webster. Revocation not only means the recalling of the power, but may denote "the vacating" of the grant for cause: Bouvier.

It may be that this is the sense in which the language of the paragraph before quoted is used. The framers of the constitution may have intended merely to prohibit the legislature from granting any "special privilege" which could not be annulled, condemned, or vacated in the manner and for the causes as might be prescribed by law. This view of the question is strengthened by the use of the word "uncontrollable" in the same connection, and the same clause most positively declares that all "privileges and franchises" shall be subject to legislative "control" and regulation. When we consider the effect and consequences of declaring that every grant of special privileges or franchises for a term of years by the state could be revoked or withdrawn at the mere pleasure or will of the legislature, we then very much doubt that the framers of the constitution, or the people in adopting it, intended to reserve to or confer such power or authority upon the legislature. The policy of the state seems to have been to encourage the building of railways, and the investment of capital in similar enterprises.

If these special privileges or franchises in question can be recalled or terminated at the will of the legislature, then it would follow that, under the same reservation in the organic law, every charter granted since the adoption of the present constitution to any railway, telegraph, or telephone company, ice factory, gas or electric light company, etc., could be repealed or revoked at the pleasure of the legislature, without the necessity of a judicial forfeiture. If the language of the constitution admitted of no other construction, it would, of course, be the imperative duty of the courts to so interpret it, regardless of consequences. If any injustice results, "the remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail": Cooley on Constitutional Limitations, 88. Where the construction would lead to "monstrous and absurd consequences," the same learned author concedes the right and duty of the courts to "question and cross-question closely" the clause, to discover if it will not admit of

another construction more in harmony "with the general purposes of such instruments." And here we invoke section 19 of the Bill of Rights, which not only protects property, but also "privileges or immunities" from destruction, "except by due course of the law of the land." While not conclusive of the question, still this provision affords some evidence of the general purpose of the constitution, and that its authors did not intend by the declaration contained in section 17 to announce that the continuance or duration of every privilege or immunity which might be "created by the legislature or under its authority" should be entirely dependent upon its caprice or will: See also sec. 22, art. 4.

With the light before us at this time, we think that the better opinion is, that this particular clause of the constitution was intended to prohibit the legislature from granting any "special privilege or immunity" in such way or of such character as that it could not be subsequently annulled or declared forfeited for such causes as might be defined by law or condemned in the exercise of eminent domain: Cooley on Constitutional Limitations, secs. 341-344; and it was further intended that "all privileges and franchises" granted by the legislature or under its authority should at all times remain subject to legislative control and regulation.

We are perfectly aware that we have not by any means exhausted the subject; but as the question under consideration has not been directly raised by the assignment of error, nor discussed by counsel, as before remarked, we think that a mere expression of opinion upon our part ought to suffice for the present, without attempting a definite decision of the question. We have merely indicated what, as it seems to us, would be the proper construction, but we do not finally commit ourselves to that view of the subject. We leave the question open to future investigation, should it be presented in another case. We will add that this provision of the constitution could hardly be held to refer only to the grant of exclusive special privileges, for the reason that no such language is used, and besides, monopolies are prohibited by another section of that instrument: Sec. 26.

Our conclusion is, that the judgment of the district court ought to be affirmed.

MUNICIPAL CORPORATIONS — GRANT OF RIGHT TO USE STREETS BY RAILWAY NOT EXCLUSIVE. — A city council cannot grant the exclusive use of a street to a street-railway company: *Canal etc. R. R. Co. v. Crescent City R. R.*
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Co., 41 La. Ann. 561; *Reining v. New York etc. R'y Co.*, 128 N. Y. 157. The streets of a city are for the benefit of all, and no one can have exclusive rights or privileges therein: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note. An irrevocable grant by a city of the exclusive privilege to construct and operate a street-railway is unconstitutional: *Birmingham etc. R'y Co. v. Birmingham Street R'y Co.*, 79 Ala. 465; 58 Am. Rep. 615.

MUNICIPAL CORPORATIONS — POWER TO AUTHORIZE USE OF STREETS FOR RAILWAY PURPOSES. — Municipal corporations empowered by charter may authorize the use of streets for railway purposes: *Railroad v. Bingham*, 87 Tenn. 522; *Canal etc. R. R. Co. v. Crescent City R. R. Co.*, 41 La. Ann. 561; *Arcata v. Arcata etc. R'y Co.*, 92 Cal. 639; *Forman v. New Orleans etc. R. R. Co.*, 40 La. Ann. 446; *Yates v. West Grafton*, 34 W. Va. 783. A municipal ordinance granting a railroad a franchise to occupy public streets for railway purposes has the force and effect of a state statute: *State v. Madison etc. R'y Co.*, 72 Wis. 612. The city of St. Louis, under its charter, cannot pass an ordinance authorizing a private corporation to build a railroad track and run trains on and across its streets for the transaction of private business: *Glaesner v. Anheuser-Busch etc. Ass'n*, 100 Mo. 508. For a further discussion of this subject, see *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note; and extended note to *Williams v. New York etc. R. R. Co.*, 69 Am. Dec. 662.

VESTED RIGHTS. — A grant of a franchise to construct and maintain a railway in the streets of a city will be construed as irrevocable and a grant in perpetuity: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note. After a company has acted upon the terms of the order of the board, and expended money in the construction of the side-track for the construction of which permission was granted, the board cannot rescind the privilege, unless the company failed to comply with the terms of the grant: *Arcata v. Arcata etc. R'y Co.*, 92 Cal. 639. See *Galveston etc. Co. v. Gulf etc. R'y Co.*, 81 Tex. 495.

TEXAS STANDARD OIL COMPANY v. ADOUE.

[83 TEXAS, 650.]

CONTRACT IN RESTRAINT OF TRADE ILLEGAL WHEN. — To render a contract void as being in restraint of trade, it is not necessary that it should create a pure monopoly, but it will be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract.

EXTENT OF TERRITORY NOT SOLE TEST OF REASONABLENESS OF RESTRICTIONS UPON TRADE. — In regard to trade or commerce in articles of prime necessity or of very frequent use among a large number of people in any given locality, the extent of the territory is not the sole test by which to determine the reasonableness of the restraint of such trade. The effect of such restraint upon the interest of the public is a better test.

COMBINATIONS TO STIFLE COMPETITION ILLEGAL. — Combinations of individuals, formed for the purpose of stifling competition in trade, are against public policy and illegal.

CONTRACT IMPOSING UNREASONABLE RESTRICTIONS UPON TRADE VOID. — A contract entered into between independent dealers and manufacturers in the same line of business, which imposes unreasonable restrictions upon trade and the freedom of the parties thereto, and whose manifest purpose and natural tendency are to prevent competition, and to reduce the price of raw materials and enhance that of the manufactured products by artificial means, to the disadvantage and detriment of the public, is contrary to public policy and void.

THIS suit was brought by the appellants to recover from the appellees the guaranteed net prices offered to the owners of the "four mills" referred to in the opinion, for all of the products of said mills, and also for the costs and expenses of production, in consideration of the strict performance on their part of all the covenants in the contract described below, and which was made a part of the petition. The parties to this contract were, at the time of its execution, independent dealers in cotton-seed and seed-cotton, and engaged in the business of manufacturing oil, oil-cake, and other products of cotton and cotton-seed in various cities in the state of Texas. The Howard Oil Company was by its charter authorized to establish and operate its mills at Dallas, and at such other places in the state as its business might require and demand. The charter of this corporation expired by limitation on the first day of July, 1889, and its directors were made parties defendant. The provisions of the contract above referred to, so far as they need be stated, are as follows: —

"Agreement entered into this eleventh day of September, 1888, by and between the Howard Oil Company, a corporation organized and existing under the laws of the state of Texas, and Samson Heidenheimer, of Galveston, Texas, on behalf of himself and all the other owners and controllers of four certain cotton-seed oil-mills situated at Galveston, Brenham, Schulenburg, and Weimar, all in the state of Texas, and two of which are operated under the name of the Texas Standard Oil Company.

"The prices which shall be paid by the parties hereto and their representatives per ton for sound cotton-seed, in the state of Texas, during the period of this agreement, shall, until changed in the manner hereinafter provided, be as follows: —

"At Galveston, Texas, nine dollars per ton and wharfage, delivered on the wharf.

“ At all other stations in Texas, excepting where the mills of the parties hereto are situate, seven dollars per ton to agents or shippers, delivered free on board cars.

“ At all stations in Texas where mills of either party hereto are situated, namely, Brenham, Schulenburg, Weimar, Dallas, Navasota, Palestine, La Grange, Sherman, Houston, and San Antonio, \$6.50 per ton, delivered by wagons.

“ The price which shall be paid by the parties hereto and their representatives for sound cotton-seed, as aforesaid, may be increased or diminished at any or all the above classes of stations by mutual agreement, in writing, of the parties hereto.

“ The said Samson Heidenheimer agrees, for himself and his associates and agents, to pay, during the term of this agreement, only such prices for sound cotton-seed as are herein fixed, and as may hereinafter be agreed upon as aforesaid.

“ The said four mills represented by the said Heidenheimer shall not, either directly or indirectly, purchase, handle, or ship any seed from the following stations, namely: Houston, Waco, Dallas, Palestine, Corsicana, Paris, Austin, Columbus, and Belton, all in the state of Texas.

“ If any seed be shipped from Schulenburg, Weimar, or La Grange, the Howard Oil Company shall have the right to purchase two thirds thereof, and the four mills represented by the said Heidenheimer shall have the right to purchase one third thereof, and no more. The said Howard Oil Company shall not purchase any seed at nor ship any from Brenham during the term of this agreement.

“ The said four mills represented by the said Heidenheimer shall purchase prime and sound seed only; but should inferior or damaged seed be shipped to any of them, such seed shall be rejected as sound seed, and paid for only at its actual value, as compared with prime sound seed.

“ The prices which shall be paid by the parties hereto and their representatives for seed-cotton during the period of this agreement shall, until changed in the manner hereinafter provided, be 2½ cents per pound and wharfage, delivered on the wharf at Galveston. A fair and equitable division of the amount of seed-cotton which may be purchased by either party shall be made, and may be adjusted from time to time, by mutual agreement between the said Howard Oil Company

and the Galveston mill of the Texas Standard Cotton Oil Company.

“The prices which shall be paid by the parties hereto and their representatives for seed-cotton, as aforesaid, may be increased or diminished by mutual agreement between John L. Kane, representing the said Howard Oil Company, and Samson Heidenheimer, representing the said Galveston mill of the Texas Standard Cotton Oil Company.

“All seed derived from seed-cotton purchased as aforesaid by the said Galveston mill shall be accounted for at the same price as cotton-seed delivered on the wharf at Galveston.

“Due care and diligence shall be exercised by the said Heidenheimer and the said four mills to properly protect and prevent the heating of all seed purchased, handled, and stored by the same. In consideration of the covenants herein by the said Heidenheimer and the said four mills to be performed, the said Howard Oil Company guarantees to the said Heidenheimer, as representative of said four mills, a profit of three dollars for every ton of sound seed properly worked by him in the said mills, allowing four dollars per ton for the expenses of working the said seed, in addition to the price paid by him for the same, as above agreed, and freight on board at the respective mills.

“The entire make or yield of cotton-seed of the aforesaid four mills shall be delivered by the said Heidenheimer to the said Howard Oil Company, or to its order, in tank-cars furnished by the latter at the respective mills; and in case the said Howard Oil Company should be unable at any time to supply a sufficient number of tank-cars at Galveston, as and when the same shall be required under the terms hereof, then the said mill at Galveston shall hold such oil in suitable storage, to the extent of five hundred barrels, without charge therefor; and should the said mill be required to provide storage for more than that amount of oil, then the said Howard Oil Company shall pay for such surplus on delivery of the warehouse receipts therefor; but the said mill shall not be required to provide storage for more than eighteen hundred barrels of oil.

“All oil made by the said four mills shall be of the quality known as prime crude oil, and shall be fully equal to prime crude oil made by the Howard Oil Company or the Galveston Oil Company.

“The said Howard Oil Company shall pay for the said oil

such a price as will insure to the producer thereof a profit of three dollars per ton for each ton of the seed from which the said oil has been properly made, as aforesaid.

“Such profits shall be estimated by deducting from the cost of the seed, the freight, and the working, the total gross price received for all the products of the seed.

“Payments shall be made from time to time on the aforesaid basis as the oil is forwarded. Such payments may be made by sight draft with bill of lading attached, and the estimated price to be paid each producer is as follows: The Galveston mill, twenty-six cents; the Brenham mill, twenty-one cents; the Schulenburg mill, twenty-one cents; the Weimar mill, twenty-one cents, per gallon. The account between the parties hereto shall be adjusted every thirty or sixty days, and a final adjustment shall be made at the termination of this agreement.

“Any oil produced at any of the aforesaid mills which may not equal the specified standard shall not be included in the foregoing arrangement, but shall be paid for only at its market value. If any difference, dispute, or question shall arise between the parties hereto as to the quality of the said oil, such difference, dispute, or question shall be submitted to John L. Kane, of Galveston, Texas, whose decision shall be final and binding upon the parties hereto.

“The said Howard Oil Company shall fix, and may from time to time alter, the minimum price at which all meal, cake, and lint produced at the said four mills shall be sold; and the said mills shall not sell any meal, cake, or lint at a price less than that so fixed and so altered. All such meal, cake, or lint shall be offered to the said Howard Oil Company before the same is offered for sale to any other parties; and the said Howard Oil Company shall have the right and option to purchase all or any of the said meal, cake, and lint at such minimum price of the market price of the day at the place of production as the said company may elect; provided, that no sale shall be made to any person at any price below the minimum hereinbefore provided for.

“The said Howard Oil Company shall declare its option for each lot of meal, cake, and lint, on receiving a written tender from the said Heidenheimer, which tender shall state the amount of each product offered, the date when deliverable, and that, to the best of his knowledge and belief, a necessity will exist for the removing of said product from the mill

named on the date named, owing to a lack of proper storage capacity. Should the said Howard Oil Company decline at any time to exercise any such option so offered, if the minimum price of any of the said products be at that time fixed by it above the market price thereof, it shall reduce the said minimum price of the products in question for the time being to such market price, to enable the said Heidenheimer or his agents to dispose of the same to other parties, to which end the said Heidenheimer promises to use due diligence and skill. Whenever the said Howard Oil Company shall exercise such option, the said Heidenheimer shall place at the free disposal of the said company all the tonnage secured, controlled, or arranged for him or his agents; and he shall assist the said company in all reasonable ways to secure the desired tonnage at fair rates; and whenever the said company declines to exercise such option, it shall assist the said Heidenheimer in the same manner.

“The said four mills shall have the privilege of supplying their present local trade with meal and hulls; and the price at which such meal and hulls shall be sold shall be fixed, and may be increased or diminished, by mutual agreement between John L. Kane, representing the said Howard Oil Company, and Samson Heidenheimer, representing the said four mills.

“All hulls and ashes sold by the said four mills, or either of them, shall be accounted for at each adjustment at the price realized therefor; and the amount thereof shall be added as a profit on products to the said mills in estimating the cost of the oil.

“The said four mills shall respectively keep accurate accounts of all cotton-seed purchased by them, or on their account, and of all the oil, meal, cake, and lint produced by them respectively, during the term of their agreement; and the said Howard Oil Company shall have the right, from time to time, and at all reasonable times, through its agents, to inspect the books and accounts of the said four mills relating to the subject-matter of this agreement.

“This agreement is to be considered as in force and effect from the first day of July, 1888, and to endure until the first day of July, 1889.

“TEXAS STANDARD COTTON OIL Co.

“HILGE BROS.

“C. BAUMGARTEN.

“HOWARD OIL Co.”

A demurrer was interposed to the petition, on the ground that this contract was in restraint of trade, unreasonable, contrary to public policy, and void, because intended to reduce the price of cotton-seed and cotton in the seed in the state of Texas, and to stifle competition, to the public detriment. The court sustained the demurrer, and dismissed the petition, and the plaintiffs appealed.

Finlay and Finlay, and Scott, Levi, and Smith, for the appellants.

McLemore and Campbell, for the appellees.

MARR, J., Section A. The appellants assign as error the action of the court in sustaining the demurrer to their petition, upon the ground that the contract sued upon is contrary to public policy and void. The appellants' counsel do not deny that the contract is one in restraint of trade, but contend that it is but partially so, and is limited in its operation to a reasonable protection of the interest of the parties thereto, and therefore not void. We may state in the outset that we do not understand that the provisions of the contract left any of the parties thereto at liberty to purchase cotton-seed at any price which they might obtain (as contended by appellants), and to simply render an account of the purchases at the prices fixed by the contract. The prices to be paid for the 'cotton-seed' were arbitrarily established by the terms of the contract without reference to the market, and were to be changed only by "mutual agreement" of John L. Kane and Samson Heidenheimer. Those established for the purchase of "cotton-seed" could not be "increased or diminished, except by the mutual agreement in writing of the parties" to the contract. The Howard Oil Company alone was invested with the absolute power of fixing, and "from time to time" of altering, "the minimum price at which all meal, cake, and lint produced at said four mills shall be sold"; and said mills were expressly prohibited from selling such products at less than the minimum price so established; and the Howard Oil Company was given an optional preference to purchase "all of such meal, cake, and lint." None of these "four mills" belonged to said company, but to the other parties to the agreement. If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto, to avoid unhealthy fluctuations in the market, or if the con-

tract had contemplated a joint and mutual association between the parties for their common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of a combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could denounce as pernicious and forbidden by law. There is no pretense, however, that any partnership was contemplated in this instance; and if there had been, the entire absence of any community of interest in the profits, losses, or capital employed would have effectually repelled the assumption.

Each party retained, after the contract as before that time, the control of his capital and the operation of his own mills, and did not throw his capital or manufacturing concerns into a common stock. He continued to operate with his own separate means, but surrendered his right of competition and of supplying his mills with raw material at the best prices he might otherwise have obtained in the markets of the state, and consented to submit to rates artificially established. But the contract — rather, I should say, the combination — did not stop at establishing prices merely. It extends far beyond this, and imperatively prohibits one of the parties in particular from “purchasing, handling, or shipping, directly or indirectly, any cotton-seed” at many of the most important markets in the state, and binds it to deliver the entire products, “make or yield” from cotton-seed, of its mills to the other party to the contract, in consideration of certain net profits guaranteed to it. We do not say that there would have been anything wrong in this last stipulation had it stood alone as an entire contract of purchase and sale of the products of the mills represented by Heidenheimer. But it does not stand alone and evidence merely an intention upon the part of the owners of “the four mills” to obtain in good faith the best prices for their own oils, without aiding or assisting the other party in any unlawful scheme or conspiracy. It forms a part of the general plan, and was plainly, as the contract expresses, superinduced by the other provisions, or “covenants,” of the agreement, inserted mainly for the benefit of the Howard Oil Company, and is therefore inextricably interwoven in these “covenants.” The latter company was allowed to purchase cotton-seed at any “station in Texas”

except Brenham; but the "four mills," represented by the other parties to the contract, were entirely excluded from the cities of Houston, Waco, Dallas, Palestine, Corsicana, Paris, Austin, Columbus, and Belton, — "all in the state of Texas." In reference to shipment of seed from Schulenburg, Weimar, or La Grange, the Howard company could purchase two thirds, and the four mills "one third thereof, and no more."

It thus appears that the above artificial regulations of the value or prices of these staple articles of trade, as well as the arbitrary restrictions imposed by the contract upon the right to deal in them in the usual or customary course of legitimate business, were intended to apply to and control, as far as the contracting parties were able to do so, the market in reference to these staples, and the agreement embraces within its operation the chief cities or commercial centers of the state, as well as the cotton-producing regions thereof, as we may judicially know: *Gulf etc. R'y Co. v. State*, 72 Tex. 409; 13 Am. St. Rep. 815; 1 Wharton on Evidence, secs. 329, 339.

There seems to us to be scarcely anything lacking to characterize the combination between the parties in this case, as evidenced by the language and purpose of their agreement, as a complete monopoly, except the proof that they were the only parties who were engaged at the specified localities in the manufactures referred to in the contract at the time it was made. It is not improbable that every cotton-oil mill in the state was represented in this combination, or was intended to be brought into it eventually; but as this is not alleged in the petition, we cannot presume it. We must admit some limit even to judicial knowledge.

But to render the contract void, it is not necessary that it should create a pure monopoly. It would seem that the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices, independent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract. Likewise, the agreement may be, in some instances, void because of unreasonable or oppressive restrictions imposed upon even one of the parties to it. According to the authorities, the extent of the restraint, though sometimes difficult to measure, determines the

character of the agreement, whether legal or not: *Pike v. Thomas*, 4 Bibb, 486; 7 Am. Dec. 741, and note. The authorities are too numerous to even cite all of them. From the multitude we shall make a few selections later on; and now we proceed with the examination of the contract.

It will be seen that the Howard company was given almost an unrestricted field to obtain the raw material for its mills, and the exclusive right to control, free from the competition of the owners of the "four mills" (who had no doubt up to that time been its rivals), not only the sales and ruling prices of the products of its own mills (which are not disturbed in this respect), but also "the entire yield" of the mills of the other parties to the contract. It was thus enabled, by the confederation of all of the parties, to dictate at will the prices at which the public must buy (if at all) the oils or other products of any of the mills. If both of the parties had entered a market open to both under the contract, in order to purchase the raw materials they could not have competed, for no competition was contemplated, and all freedom of action in this particular was forestalled by arbitrary regulations of the prices to be paid, which must be observed. In the markets assigned to each, they are confronted by the same barrier, and the party cannot buy at all if the market price at that point happens to be greater than the contract price; or if the price prevailing there should even be below the contract price, still the party could not avail himself of this advantage without first obtaining, if he could, the consent of the other parties. In other words, neither the parties nor the producers of the raw material are to have the benefit of but one price, which has been definitely fixed in advance. These things, as it seems to us, are well calculated to affect the interests of the public detrimentally, and would doubtless have been deemed by the parties as injurious to their own interests had they been contemplating a lawful enterprise. These restrictions, however, were instituted in this instance, not for the purpose of legitimate profits, nor to afford only a fair protection to all of the parties, but as suitable means for preventing all competition. If not, then it would have clearly been to the advantage of the Howard Oil Company, in view of its obligations to the "four mills," that the raw materials should be bought by all of the parties to the contract at the lowest figures. This company had bound itself to pay or bear the cost of the

seed, as well as the expenses of "working" the same by "the four mills," etc.

We recur now to the law of the case. We can scarcely conceive how mere territorial limits can be the controlling test in all instances of the legality of the restraints imposed upon the ordinary course of trade. This criterion may do very well when applied to the occupation or profession of one man, or even a few individuals; for neither their labor, industry, business, nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade or commerce in those articles of prime necessity, or even of very frequent use, among a large number of people in any given locality. Does any one doubt that a combination of a number of the most extensive dealers in flour, meat, or oils, etc., in one great city, to sell those commodities at only one price or not at all within the limits of that city, would affect the interests of the public, and perhaps, also, some of the individual dealers, much more extensively and disastrously than a similar agreement extended to a much greater area of country, but in which only a very few people reside or require such articles? It would seem that the injurious effects upon the public interests would be in proportion to the number of people affected by the restrictions, though we are not unaware that this position has not been deemed tenable by some of the authorities in cases where the right to exercise a trade or profession within a particular district or locality has been restricted by contract: *Mallan v. May*, 11 Mees. & W. 653; but see *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; 1 Smith's Lead. Cas. 183; note to *Angier v. Webber*, 92 Am. Dec. 751. We think that territory cannot be the sole test, though in the present instance the contract embraces such extensive territory and such a number of localities as to bring it even within that rule. In determining the reasonableness of the restraint, the effect upon the interest of the public is a better test.

In the case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 185, 8 Am. Rep. 159, the supreme court of Pennsylvania quote with approval the following language of Tindal, C. J., in *Horner v. Graves*, 7 Bing. 748: "We do not see how a better test case could be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection as to the

interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatsoever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. What is injurious to the public interest is void on the ground of public policy."

The court also recognizes the doctrine that the "public interest is superior to private interest," and that even as to "contracts for the limited restraint of trade, the courts start with the presumption that they are illegal, unless shown to have been upon adequate consideration, and upon circumstances both reasonable and useful." The court furthermore said that, "testing the present contracts by these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide and the influence too general. The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by the five companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though that might have been detrimental to the public interest. There is certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others." We approve of these observations, but do not sanction a combination of individuals to stifle competition. The court then proceeds, in the next place, to discuss at length the extent and scope of the combination, and denounces it as a conspiracy intended to control the coal markets of the country by stifling competition, and therefore void.

"Whatsoever a man may lawfully forbear, that he may oblige himself against, except where a third person is wronged or the public is prejudiced by it": Metcalf on Contracts, 282. This language was adopted by the supreme court of Ohio in *Crawford v. Wick*, 18 Ohio St. 208, 98 Am. Dec. 108, which involved the construction of a contract in restraint of trade. We refer to this decision as bearing upon those provisions in the contract in hand which prohibits the parties from purchasing cotton-seed in the specified localities, etc.

In the case of *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 566, 23 Am. Rep. 190, the court uses the following language: "If an absolute purchase had been made by the defendant of the Butler Coal Company of any specified quantity of coal, or even of all the coal which the Butler Company could produce, that contract would have been legal, notwithstanding that the object of the purchaser was to secure a monopoly, and that the vendor knew it. He had a right to dispose of his own goods; and, under certain limitations, a vendor may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. . . . But — and this is a very important distinction — if the vendor does anything beyond making the sale to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price," etc. Elsewhere in the opinion it is said: "Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the articles in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more pernicious than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, or other indispensable commodities, might be artificially raised to a ruinous extent, far exceeding any naturally resulting from the proportion between supply and demand."

We have already shown that the agreement under consideration does not evidence simply a contract made in good faith for the sale by the owners of the "four mills" to the Howard Oil Company of the products of their mills. In the case of *India Bagging Ass'n v. Kock*, 14 La. Ann. 164, it was held that an agreement between eight commercial firms in the city of New Orleans, whereby they bound themselves for the period of three months not to sell India bagging except with the consent of a majority of them, was void. The decision seems to have been based, from the authorities cited, upon the principles of both the civil and common law. The court said: "The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price

in the market of an article of primary necessity to cotton-planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

Nowhere, perhaps, is the duty of the courts in reference to contracts of the character we are considering, as well as the present state of the common law (in the absence of statute), even under "the modern doctrine," better defined than in the opinion of the supreme court of Michigan in *Raymond v. Leavitt*, 46 Mich. 447, 41 Am. Rep. 170 (cited by Wharton, *infra*, p. 612), from which we cull the following: "We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. . . . There may be difficulties in determining conduct as in violation of public policy where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot sustain the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose that the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized, and until the law is changed we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by other than legal measures."

The attention of our own legislature seems to have been "called" to the subject; but instead of "legalizing" such combinations or conspiracies in restraint of trade, the legislature has denounced them as felonies, thus manifesting the public sentiment in this state. This was done, however, subsequently to the execution of the contract in hand. Space forbids us to make any more extracts from the opinions to be found in the adjudicated cases. We are of the opinion that the contract under consideration, and which was entered into by independent dealers and manufacturers in the same line of business, as already stated, imposed, or attempted to impose, unreasonable and too extensive restrictions upon trade and the freedom of the parties thereto, and was consequently contrary to public policy and void. We think that its manifest purpose and natural tendency were to prevent competition in too many localities, and to reduce the price of the raw materials upon the one hand, as they might choose, and upon the other to enhance

that of the manufactured products by artificial means, to the disadvantage and detriment of the public: 1 Wharton on Contracts, sec. 442, and notes; *Callahan v. Donnelly*, 45 Cal. 152; 13 Am. Rep. 172; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327; *Wright v. Ryder*, 36 Cal. 342, 361; 95 Am. Dec. 186; *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258; *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667 (based on statute). See also, for a collation of the authorities, note to *Angier v. Webber*, 92 Am. Dec. 751. Our present statute against trusts and combinations of every character in restraint of trade, etc., was not in force when the contract now before us was executed, and is not, therefore, applicable to the question: Acts 1889, p. 141.

We think that the judgment should be affirmed.

CONTRACTS IN RESTRAINT OF TRADE. — An agreement between several transportation companies for the purpose of destroying competition and establishing uniform rates of freight is injurious to trade and commerce: *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258. A contract between the manufacturers of a certain article in which one agrees not to engage in its manufacture in eight designated states for five years, nor to allow the premises formerly occupied by him to be used for that purpose, is void as in restraint of trade: *Western etc. Ass'n v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686, and note. Contracts between individuals or private corporations to keep up the price of an article of utility are void: *Santa Clara etc. Lumber Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211, and note. For a discussion of contracts in restraint of trade, and their validity, see extended notes to *Callahan v. Donnelly*, 13 Am. Rep. 173; *Angier v. Webber*, 92 Am. Dec. 751; *Pike v. Thomas*, 7 Am. Dec. 743.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

NORFOLK AND WESTERN RAILROAD COMPANY v.
COMMONWEALTH.

[88 VIRGINIA, 95.]

COMMERCE — INTERSTATE. — ANY ATTEMPT BY A STATE to regulate foreign or interstate commerce is void as an attempted exercise of a power which has been surrendered by the states to the national government.

COMMERCE — INTERSTATE SUNDAY TRAINS. — A state statute forbidding the running of interstate freight trains on Sunday between sunrise and sunset is void as a regulation of and obstruction to interstate commerce, no matter what its professed object may be.

WRIT of error to a judgment of the circuit court affirming a judgment of the county court sustaining a conviction for a violation of a Sunday law by the plaintiff in error, and condemning it to pay a fine of fifty dollars. The plaintiff in error admitted a violation by it of a law of the state, but claimed the law to be void as a regulation of interstate commerce. The law in question forbids the running of railroad trains on Sunday between sunrise and sunset, except such as are used exclusively for the relief of wrecked or disabled trains, or trains used for the transportation of United States mails, passengers, live-stock, or articles of such perishable nature as would be necessarily impaired in value by a delay of one day in their passage.

Phlegar and Johnson, and Brown and Moore, for the plaintiff in error.

R. T. Scott, attorney-general, and D. S. Pollock, for the state.

Lewis, P. The defendant's contention on the merits in the trial court and here is, that the statute upon which the indictment was founded is, so far as it applies to a case like the present, repugnant to the constitution of the United States, which gives to Congress the power to regulate commerce among the several states. The precise propositions contended for on this point are: 1. That the act of transportation mentioned in the proceedings was commerce between the states; 2. That such commerce is, as to all matters that admit of uniformity of regulation, subject only to congressional regulation; 3. That section 3801 of the code is a regulation of commerce; and 4. That as such it cannot be applied to interstate commerce, or to the train in question.

It is an historical fact, well known, that to secure uniformity and freedom in commercial intercourse, and with that view to establish a single government empowered to regulate commerce, was the chief consideration that led to the formation and adoption of the federal constitution. Accordingly, that instrument ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes": Art. 1, sec. 8.

The power thus conferred, as the supreme court of the United States has repeatedly decided, is complete and exclusive. It is the unlimited power, in other words, to prescribe rules by which commerce shall be governed, and to determine how far it shall be free and untrammelled. Any attempt, therefore, by a state to regulate foreign or interstate commerce is the attempted exercise of a power which has been surrendered by the states and granted exclusively to the national government. It is an attempt to do that which Congress alone is authorized to do, and hence is a nullity.

As was said in *Hannibal etc. R. R. Co. v. Huse*, 95 U. S. 465: "Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." And in a subsequent part of the same opinion, it was said that transportation is not only essential to commerce, but that it is commerce itself, and that every obstacle to it, or burden laid upon it, by legislative authority, is regulation. See also

County of Mobile v. Kimball, 102 U. S. 691; *McCall v. California*, 136 U. S. 104.

"It cannot be too strongly insisted upon," said the court in *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557, "that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it that the commerce clause of the constitution was intended to secure. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of the transportation must be done could impose regulations concerning the price, compensation, or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce."

And in a still more recent case, it was remarked that in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems: *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489.

There is, indeed, what has been termed a kind of neutral ground, which may be constitutionally occupied by the state, so long as it interferes with no act of Congress. Thus where the subject is local in its nature or sphere of operation, such as the establishment of highways, the construction of bridges over navigable streams, the regulation of harbor pilotage, the erection of wharves, piers, and docks,—in these and other like cases, which are considered as mere aids rather than regulations of commerce, the state may act until Congress supersedes its authority. But where the subject is national in its character, admitting of uniformity of regulation, such as the transportation and exchange of commodities between the states, Congress alone can act upon it.

The case of *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, is sometimes cited as an authority to the contrary,—that is, for the proposition that in the absence of congressional action, a state may regulate interstate commerce within its own territorial limits. But this statement is broader than the decision justifies; for it was expressly said in that case that "whatever subjects of this power are in their nature na-

tional, or admit of only one uniform system or plan of regulation, may be justly said to be of such a nature as to require exclusive legislation by Congress."

And in the very recent case of *Leisy v. Hardin*, 135 U. S. 100, known as the "Original Package Case," where the subject is fully considered, Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language: "The power to regulate commerce among the states is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. But these powers, it was said, "though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power."

And in the same case the principle was again announced, as it had often been before, that the transportation of passengers or of merchandise from one state to another is in its nature not local, but national, and therefore admitting of but one regulating power.

These authorities, which are only a few of many that might be cited to the same effect, are sufficient to show the invalidity of legislation by the states in regard to subjects of commerce which are in their nature national, no matter what may be the avowed object of such legislation, and that nothing is gained by calling it the police power. The subject was elaborately discussed, and with his accustomed force, by Mr. Justice Miller in *Henderson v. Mayor of New York*, 92 U. S. 259, where it was declared that however difficult it may often be

to distinguish between one class of legislation and another, it is clear from our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to Congress, it is void, no matter under what class of power it may fall, or how closely allied to powers conceded to belong to the states.

In *Hannibal etc. R. R. Co. v. Husen*, 95 U. S. 465, it was said: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. . . . But whatever may be the nature and reach of that power," it was added, "it cannot be exercised over a subject confided exclusively to Congress by the federal constitution. It cannot invade the domain of the national government."

Nor does it matter, in such a case, that Congress has not acted; for it is now settled that the silence of Congress is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but on the contrary, the only legitimate conclusion is, that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. "Hence," as was decided in *Leisy v. Hardin*, 135 U. S. 100, following many previous decisions, "inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled."

In *Norfolk and Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, the court, in an opinion by Mr. Justice Lamar, said: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in

which each agency acts in that transaction, it is subject to the regulation of Congress."

It is also a well-established principle that an article of commerce transported from one state to another is protected by the constitution against interfering state legislation, until it has mingled with and become a part of the common mass of property within the latter state; and if this be so, *a fortiori* is protected while *in transitu*: *Brown v. Maryland*, 12 Wheat. 419; *Welton v. Missouri*, 91 U. S. 275; *Leisy v. Hardin*, 135 U. S. 100.

Tested by these principles, which are axiomatic, it is clear that the judgment complained of is erroneous.

That the transportation of the coal and coke mentioned in the proceedings was an act of commerce, national in its character, is too plain to admit of doubt. And it is equally clear that the legislation in question, in so far as it extends to a case like the present, is unwarranted and void. A statute which forbids the running of interstate freight trains between sunrise and sunset on a Sunday is, by its necessary operation, no matter what its professed object may be, a regulation of commerce. At all events, it is an obstruction to interstate commerce, which, for the purposes of the present case, amounts to the same thing; for, in any view, it is an invasion of the exclusive domain of Congress, and therefore void.

To say that the state may, in the exercise of her police powers, enforce by statute observance of the sabbath, not as a religious duty, but as a day of rest, is no answer to the constitutional objection here raised. The validity of such legislation, when not in conflict with a higher law, is acknowledged by all, and its wisdom and propriety denied by none,—certainly not by this court. But when, in a case like the present, it contravenes the constitution of the United States, the latter must prevail, because it is "the supreme law" in all matters relating to the regulation of interstate commerce.

Such a statute, if passed by Congress, so far as it concerns foreign or interstate commerce, would be valid, not, however, as the exercise of police power, but as a regulation of commerce. And the reason which would make such legislation valid as an act of Congress makes it invalid as an act of a state legislature.

As to the effect of the statute in question, if sustained, upon the commercial interests of the country, we need not stop to

inquire. It is enough to say, that to the extent indicated, it is not valid.

In *Henderson v. Mayor of New York*, 92 U. S. 259, it was decided that whatever may be the nature and extent of the police power of a state, "no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the constitution."

This principle was reaffirmed in *Leisy v. Hardin*, 135 U. S. 100, where it is said that such a subject-matter is not within the police power of a state, unless placed there by congressional action. And the observations of Mr. Justice Matthews in *Bowman v. Chicago etc. R'y Co.*, 125 U. S. 465, were quoted with approval, to the effect that in view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several states.

The fact, if it be a fact, that the statute in question was not intended as a regulation of commerce does not, we repeat, affect the case. There may be no purpose, it has been held, upon the part of a legislature to violate the constitution, and yet a statute enacted under the forms of law may, by its necessary operation, injuriously affect rights secured by the constitution, in which case the statute, to that extent, must be declared void: *Brimmer v. Rebman*, 138 U. S. 78. This is merely stating in different form the proposition affirmed in the *Henderson* case, namely, that in whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect,—a proposition that would seem to be incontrovertible.

In the last-mentioned case, a statute of New York which required the master or owner of every vessel landing passengers at the port of New York from a foreign country to give a bond in a prescribed penalty for each passenger so landed, as an indemnity against any expense to be incurred by the state or city for the support of such passengers, was held void, as being a regulation of commerce, although it was sought to be sustained as a police regulation to protect the state against the influx of paupers, the practical result of the statute being to impose a burden upon all the passengers so landed from a foreign country.

So in the case of *Chy Lung v. Freeman*, 92 U. S. 275, a similar statute of California, intended to prevent the introduction of lewd women into that state, was held void, as going beyond the necessity of the case, and amounting, in its practical operation, to a regulation of foreign commerce.

Upon the same principle, statutes prohibiting the introduction of intoxicating liquors into the states enacting them have been held to be infringements of the commerce clause of the constitution, and not valid police regulations to guard against the evils of intemperance. And numerous illustrations of the same principle are to be found in the adjudged cases, all of which show that when, in the attempted exercise of the police power, no matter upon what ground it is sought to be exercised, the action of a state comes in conflict with a power vested exclusively by the constitution in Congress, such attempt is a nullity; and the present case comes within this principle.

The power of the state to enforce observance of the sabbath as a police regulation stands upon no higher footing than her power to guard against the evils of vice or intemperance, or of imported pauperism, or infectious diseases. In either case the nature and extent of the power is exactly the same, and there is no principle for holding otherwise.

Our intention has been called in this connection to *State v. Baltimore etc. R. R. Co.*, 24 W. Va. 788, 49 Am. Rep. 290, wherein a "Sunday law," so called, similar to the one we have been considering, was upheld under circumstances resembling those of the present case. The court in that case admitted that transportation between the states is commerce between the states, and that such commerce is necessarily under the exclusive control of Congress. But it denied that non-action by Congress is equivalent to a declaration that such commerce shall be free and untrammelled, and upon that ground sustained the statute *in toto*.

As to the last proposition, we have already shown by the cases referred to — some of them decided since that case was decided — that the rule is otherwise, and after a careful examination of the case, we find nothing in it to raise a doubt that the rule has been rightly settled.

The judgment must therefore be reversed, and the defendant discharged from further prosecution under this indictment, which ought to have been quashed.

LACY, J., dissented, on the ground that the statute in question is not a law regulating commerce with foreign nations, among the states, or with the Indian tribes; and consequently does not invade nor conflict with the granted powers of the federal Congress. This statute says nothing about commerce, nor about transportation between the states, and is absolutely limited in its operation to the state. It is intended as an exercise of the police power of the state in the interest of morality and decency, and over which Congress has no control. "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." The power of Congress over commerce is exclusive only so far as it relates to matters which admit of a requisite uniformity of regulation affecting all the states. The clause of the federal constitution giving to Congress the right to regulate interstate commerce was adopted to secure uniformity against discriminating state legislation. "State legislation is not forbidden in matters either local in their operation or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired. Congress, by its inaction in such matters, virtually declares that until it deems best to act, they may be controlled by the state": *County of Mobile v. Kimball*, 102 U. S. 691; *Sherlock v. Alling*, 98 U. S. 99. The cases holding legislation of a state to be void for interfering with the commercial power of Congress are cases wherein "the legislation created, in the way of tax, license, or condition, a direct burden of commerce, or in some way directly interfered with its freedom; and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or engaged in commerce, foreign or interstate, or in any other pursuit. Judge Cooley says, in his work on constitutional limitations (page 722): 'The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is something dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and to whatever extent ground shall be covered by these directions, the exercise of state power is excluded.'" Among these cases are *Brown v. Maryland*, 12 Wheat. 419-425; *Passenger Cases*, 7 How. 283-445; *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 518; *State Tonnage Tax Cases*, 12 Wall. 204; *Welton v. Missouri*, 91 U. S. 275. "Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations that are made by Congress do not often exclude the establishment of others by the state covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole coun-

try; while in some localities state and local policy will demand peculiar regulations with reference to special and peculiar circumstances."

The commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulation affecting all the states. When the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until Congress interferes and supersedes their action: *Cardwell v. American Bridge Co.*, 113 U. S. 205. The case of *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, applies to an interstate line of railway, and in this case the court said: "There can be no doubt that each of the states through which the Ohio and Mobile railroad passes incorporated the company for the purpose of securing the construction of a continuous line of interstate communication between the Gulf of Mexico in the south and the Great Lakes in the north. It is equally certain that Congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation; but it is none the less true that the corporation created by each state is, for the purposes of local government, a domestic corporation, and that its railroad within the state is a matter of domestic concern. Mississippi may govern this corporation as it does all domestic corporations in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision of this court, regulate freights and fares for the business done exclusively within the state; and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence, etc., as much of its road as lies within the state, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to put its tariffs and time-tables at proper places, etc. This company is not entirely relieved from state control in Mississippi simply because it has been incorporated by and is carrying on business in the other states through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the constitution of the United States within the exclusive jurisdiction of Congress. It is not enough to prevent the state from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the state as well as within." To the same effect: *Smith v. Alabama*, 124 U. S. 465; *Nashville etc. R. R. Co. v. Alabama*, 128 U. S. 96; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Chicago etc. R. R. Co. v. People*, 105 Ill. 657; *Rae v. Grand Trunk R'y Co.* 14 Fed. Rep. 401; *Ex parte Koehler*, 30 Fed. Rep. 867; *Chicago etc. R'y Co. v. Becker*, 32 Fed. Rep. 849; *Iowa v. Chicago etc. R. R. Co.*, 33 Fed. Rep. 391.

"This is the result of all the decisions of the federal courts. If the act in question only applies to and operates upon transportation within the state, it is immaterial that which the company operated on is part of an interstate line. It must not only affect commerce, but it must affect commerce with foreign nations, or among the states, or with the Indian tribes. But if the act is one done in the exercise of a police power, it is within the legitimate and unchallenged domain of the state, such as to regulate concerning the public health, public peace, and morality and decency." The police power

is defined to be "the authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, and is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life. The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances as they shall judge to be for the good and welfare of the commonwealth, and for the subjects of the same. The exercise of this power, at least, has been left with the individual states, and cannot be taken from them, and exercised wholly or in part under legislation of Congress": *United States v. Dewitt*, 9 Wall. 41; Cooley on Constitutional Limitations, 715. Certain powers directly affecting commerce may be exercised by the state when the purpose is not to interfere with congressional legislation, but merely to regulate the time and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion: *Vanderbilt v. Adams*, 7 Cow. 351.

Laws which prohibit ordinary employments on the sabbath may be defended, "either on the same ground which justifies the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of the body and mind." Such laws may, without question, be supported as regulations of police: *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518; *Bloom v. Richards*, 2 Ohio St. 387; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 130.

In conclusion, Mr. Justice Lacy said: "Upon this subject of the sabbath-day observance, I have found none but state decisions in a great multitude of cited cases. It does not appear to have been ever, so far as my investigation has gone, which has been somewhat limited and not thorough, a matter of decision with the federal courts, so far as the states are concerned. And I believe there is no probability that Congress will ever assume the right to regulate the observance of the sabbath day in the states. If, however, it should ever do so, I do not doubt that the American Congress will protect the American sabbath day from unnecessary desecration, by whomsoever it is essayed. Nor do I doubt that if the supreme court of the United States should have this question under consideration, it would hold, as my view is, that the Sunday laws of this commonwealth are within the police powers of the state; and moreover, that they in no wise affect interstate commerce, but, being limited in their operations to the state, whatever effect they have upon the through line of transportation outside of the state, it is no more than is proper, and in no way an interference with the granted power of the Congress. It is to be regretted, as it is a federal question, that it cannot go up to the supreme court of the United States and be settled there. Holding the views I do, I am constrained to dissent from the opinion of the majority."

INTERSTATE COMMERCE — STATE STATUTE REGULATING. — From the moment that an article commences to move from one state to another it becomes the subject of interstate commerce, and subject only to federal legislation, and the police power of the state ceases: *Bennett v. American Express Co.*, 83 Me. 236; 23 Am. St. Rep. 774, and note. The power of the federal Congress

over commerce between the states is, as a general rule, exclusive, but the state may pass statutes for the purpose of facilitating the safe carriage of goods and passengers, such as are not in conflict with valid federal statutes: *Bagg v. Wilmington etc. R. R. Co.*, 100 N. C. 279; 26 Am. St. Rep. 569, and note.

HUBBLE v. COLE

[83 VIRGINIA, 236.]

INJUNCTION — REMEDY FOR UNLAWFUL ISSUE OF. — A TENANT who has been enjoined without cause by the landlord from enjoying the leased premises may, upon the dissolution of the injunction, recover damages in an action on the case for the injury, in addition to his remedy on the injunction bond.

INJUNCTION — REMEDY FOR UNLAWFUL ISSUE OF. — A defendant in an injunction suit has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy on the injunction bond.

F. S. Blair, for the plaintiff in error.

St. John, and Buchanan and Buchanan, for the defendant in error.

LACY, J. This action is covenant, and the declaration set forth that on the thirtieth day of December, 1881, in the county of Smyth, the defendant leased for the term of five years to the plaintiff, in consideration of the sum of three thousand dollars, to be paid to her as stated in the deed of lease executed by them, certain real estate situated in the said county, with conditions stated and set forth in said deed; that the plaintiff performed all the covenants of the said deed on his part, but that the defendant did not perform on her part, setting forth the breaches, and by injunction prevented the plaintiff from cultivating the land, etc., and deprived him of the use and profit of the said land mentioned in the declaration from the twenty-eighth day of November, 1883, until after the expiration of the lease; that the said injunction was by decree of the supreme court of appeals of Virginia dissolved, and the bill dismissed; and laid his damages at four thousand five hundred dollars. The defendant demurred to the declaration, which demurrer the court sustained, and rendered judgment for the defendant, from which judgment the plaintiff applied for and obtained a writ of error to this court. The ground of the court's decision is, that the common-law action of covenant will not lie when the alleged breach was

by legal process, as by injunction; that when damage was caused, and the injunction not sustained, the injunction bond furnished the only remedy, all others being merged therein. Mr. High says (High on Injunctions, sec. 1648): "Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause; and the rule has been broadly stated that no such right of action exists. The better doctrine, however, seems to be, that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action in the case will lie"; citing *Cox v. Taylor*, 10 B. Mon. 17. Mr. Barton says in his *Chancery Practice* (page 478): "The right to damages upon the dissolution of an injunction is independent of any statutory provision upon the subject, and amid some conflict of the decided cases, it is said that this right is cumulative of and in addition to the right of action at law upon the injunction bond. While the court decrees damages upon the dissolution, it cannot go beyond the injunction bond, so far as the penalty is fixed therein; and when damages have been thus awarded, the decree of the court is conclusive as to the amount which can be recovered in an action on the bond; but not so the right of action on the contract, whose covenants have been broken." Mr. Lawson says (Lawson's Rights, Remedies, and Practice, sec. 3704): "It is now held that the defendant in an injunction suit has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy upon the bond": *Mitchell v. Southwestern R. R. Co.*, 75 Ga. 398; *Manlove v. Vick*, 55 Miss. 567; *Gorton v. Brown*, 27 Ill. 489; 81 Am. Dec. 245; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Hayden v. Keith*, 32 Minn. 277. In some of the states this matter is regulated by statute, and it is provided by law that before decree defendant may file his account for all damages, and have them in that suit allowed; but when there is no specific mode prescribed by the statute of assessing damages, and no such provision exists by statute, the right of action at law is in addition to the remedy upon the bond. The declaration states a good cause of action, and the demurrer should have been overruled. The defendant was undoubtedly bound by her deed; and if, without sufficient cause (and the dissolution of the injunction and dismissal of the bill is conclusive of that), the defendant deprived the plaintiff of the benefits and profits accruing to

him thereunder, she should undoubtedly respond in damages.

The judgment appealed from is erroneous, and the same will be reversed and annulled, and the cause remanded for a new trial to be had therein, when the demurrer must be overruled, and the case proceeded in to final judgment upon the merits.

INJUNCTION — REMEDY FOR UNLAWFUL ISSUE OF. — When an injunction is wrongfully issued, and is framed in ambiguous terms, the defendant therein is entitled to recover such damages as he has sustained in obeying it, as he in good faith understood it: *Webb v. Laird*, 62 Vt. 448; 22 Am. St. Rep. 121; *Coates v. Caldwell*, 71 Tex. 19; 10 Am. St. Rep. 725. Although the defendant may ask the court of chancery to grant him damages on the dissolution of the injunction, if the proof of damages is insufficient, it is not error for the decree of dissolution to provide that it shall be without prejudice to the right of the defendant to sue on the injunction bond: *Davis v. Hart*, 66 Miss. 642. Upon the dissolution of an injunction restraining a trespass, the court has no right to assess damages accruing from the injunction. They should be recovered in another suit: *Greer v. Stewart*, 48 Ark. 21. Actual damages are allowed upon the dissolution of an injunction, where the party obtaining it acted in good faith, and had plausible rights threatened with invasion: *Riggs v. Bell*, 42 La. Ann. 666; *Holloway v. Holloway*, 108 Mo. 274. When an established business is suspended by a preliminary injunction improperly issued, the profits which would have been made can be recovered: *Lambert v. Haskell*, 80 Cal. 611.

NORFOLK AND WESTERN RAILROAD COMPANY v. GROSECLOSE.

[88 VIRGINIA, 267.]

RAILROADS — CONTRIBUTORY NEGLIGENCE OF PARENT NOT IMPUTABLE TO CHILD. — In an action by a child of tender years and *non sui juris*, or by its personal representative, against a railroad company to recover for negligent injury to such child, the contributory negligence of its parent is not imputable to it.

NEGLECT OF PARENT, WHEN IMPUTABLE TO CHILD. — In an action by a parent to recover for loss of service caused by an injury to his child, the contributory negligence of the parent is a good defense, but such negligence is not imputable to a child *non sui juris*, when the action is by the child or its personal representative.

RAILROADS — PURCHASE OF TICKET BEFORE ENTERING TRAIN is not necessary to constitute a person a passenger.

NEGLECT — EVIDENCE — DECLARATIONS OF PARENT. — In an action by a child or its personal representative to recover for negligent injury to it, the declarations of the mother of the child, made immediately after the accident, are merely hearsay, and not admissible in evidence.

Fulkerson, Page, and Hurt, for the plaintiff in error.

F. S. Blair and Daniel Trigg, for the defendant in error.

LEWIS, P. The action was to recover damages for the alleged negligent killing of the plaintiff's intestate, a child five years and one month of age. On the 9th of February, 1888, M. L. Groseclose, accompanied by his wife and five children, went to Meadow View, a station on the defendant's road, in Washington County, to take a train for Rural Retreat, in Wythe County. He purchased of the depot agent at Meadow View two whole tickets and two half tickets for himself and family. Of the five children, two were under five years of age; the other three were over that age, but under twelve.

Before the arrival of the train at the station, the father asked and secured the assistance of three gentlemen, who were present, to get the children on the car. The train was a local freight train, having at its rear end a caboose for passengers. Upon the arrival of the train, and after it had stopped, the children and their adult attendants left the depot platform and started for the train. Several passengers alighted from the caboose car, when Groseclose, the father, with one of the children, went up the steps and into the car. He was followed by a Mr. Naff, who carried another child. Following Naff was Mrs. Groseclose, but just as she had gotten up the steps, the train, with a violent and sudden jerk, started backwards, the steps of the caboose striking the deceased, who was standing on the ends of the ties, and throwing him under the wheels of the train, which passed over and crushed his left leg, and inflicted other injuries, which caused his death the same day.

The conductor of the train saw the party approaching the caboose, with the luggage, but paid no attention to them. In fact, he went in another direction, to see, as he says, about the freight. And not only this, but he deliberately ordered a brakeman to signal the engineer to back the train, when he knew, or ought to have known, that passengers were in the act of getting on, to whom no warning whatever was given. The whistle on the engine was not sounded, nor the bell rung, and the only signal to the engineer was a slight wave of the brakeman's hand.

Under these circumstances, a clearer case of culpable negligence, or the violation of the duty of a railroad company, as a part of the implied contract to carry safely, to give its pas-

sengers time to get off and on in safety, could hardly be imagined: Wharton on Negligence, sec. 648; *Norfolk & W. R. R. Co. v. Prinnell*, 12 Va. L. J. 72.

The company, however, contends it was negligence on the part of the parents to allow the deceased to stand at the place he was when struck, and that their contributory negligence bars a recovery. It is conceded that the deceased himself, by reason of his tender years, was *non sui juris*, and therefore incapable of contributory negligence.

There was evidence for the company, on the question of the parent's negligence, tending to show that the deceased when struck was standing behind the car, between the rails, apparently attempting to climb upon the bumper. But this evidence must be rejected, because it is in conflict with the plaintiff's evidence, which shows that he was not between the rails, but was standing near the car, on the ends of the ties. We say the evidence must be rejected, because, as the evidence, not the facts, being certified, the case stands in this court as on a demurrer to evidence; and viewing the case in this light, the charge of contributory negligence is not sustained. But that is a wholly immaterial question in this action. When the suit is by a parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is consequently not to be considered, when the suit is by the child or its personal representative: *Shearman and Redfield on Negligence*, sec. 48 a; *Gleassy v. Hestonville etc. R'y Co.*, 57 Pa. St. 172; *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716.

The doctrine of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, has been repudiated in this state, as in many other states of the Union, and the doctrine established as just stated: *Beach on Contributory Negligence*, sec. 42; *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455; *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 408; 98 Am. Dec. 175; *Galveston etc. R'y Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; *Erie City etc. R'y Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471; *Robinson v. Cone*, 22 Vt. 214; 54 Am. Dec. 67; *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *Smith v. Hestonville etc. R'y*, 92 Pa. St. 450; 37 Am. Rep. 705; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449; *Sioux City etc.*

R. R. Co. v. Stout, 17 Wall. 657; 4 Am. & Eng. Ency. of Law, 88, and cases cited.

Hence, when the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of the parent at the time the injuries were received, and although the estate is inherited by the parent. Of course, it is essential to a recovery in any case that negligence on the part of the defendant be shown. But when that is proven in a suit by the child, the parent's negligence is no defense, because it is regarded, not as a proximate, but as a remote cause of the injury. And the reason lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is the agent of the child, for the latter cannot appoint an agent. The law confides the care and custody of a child *non sui juris* to the parent, but if this duty be not performed, the fault is the parent's, not the child's. There is no principle, then, in our opinion, upon which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law: Wharton on Negligence, sec. 312; Patterson on Railway Accident Law, 93; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449.

In the last-mentioned case, which was an action by the administrator of a deceased child, two years of age, whose death was caused by the breaking of a bridge upon which the child was driven in a carriage by its parents, the supreme court of Iowa, after announcing the same doctrine, adds: "Some authorities seem to make a distinction between cases where the contributory negligence of the parent occurs while he has the child under his immediate control and other cases which occur when the child is away from the parent; but we are of the opinion that there is no sufficient ground for the distinction claimed. The authority of the parent does not depend upon the proximity of the child."

This view seems to us correct in principle, and is undoubtedly supported by the great weight of authority. In a recent work, wherein the subject is discussed and the cases are collected, the learned author says: "A doctrine formerly obtained in some courts of this country, called imputed negligence, under the operation of which, if a child of such tender age as not to be capable of caring for its own safety was negligently exposed to danger by its parent or guardian, and injured, the

negligence of the parent or guardian would be imputed to the child, and the child could not recover damages for the injury; but this rule," he adds, "though approved at one time in several American jurisdictions, has been denied in others, and seems fast going by the board": 2 Thompson on Trials, sec. 1687.

Another point made by the company is, and the court at the trial was asked, in effect, to instruct the jury, that if the father of the child, at the time of the accident, was endeavoring to take it on the train without paying fare, then it could not be considered a passenger, and the liability of the company was not to be determined by the law relating to carriers and passengers.

This instruction was rightly refused. The purchase of a ticket before entering a railroad train is not necessary to constitute a person a passenger, nor is there any evidence in the case tending to show that the father was attempting to defraud the company, or was not acting in perfect good faith. It does not appear, moreover, that he knew a ticket for the deceased was required. The conductor of the train, a witness for the company, testified that tickets for children under six years of age were not required. In point of fact, however, the regulations of the company require half-rate tickets for children between the ages of five and twelve years. But if the conductor of the train was ignorant of that requirement, would it be strange if the father of the deceased was also? This is a matter, however, of no importance whatever. The deceased, undoubtedly, was a passenger, and as such entitled to the utmost degree of diligence and care on the part of the company in looking out for his safety: 2 Wait's Actions and Defenses, 65; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394; *Shenandoah V. R. R. Co. v. Moose*, 83 Va. 827.

Complaint is also made of the action of the circuit court in refusing to permit the defendant to prove the declarations of the mother of the child immediately after the accident. The assignment of error on this point is general in its terms, and no reasons are urged in support of it; nor are we aware of any principle upon which the declarations were admissible. The mother is not a party to the suit, nor interested in the result. Her declarations were merely hearsay, and no more bind the estate of the deceased than would the declarations of any stranger. There was no error, therefore, in excluding them.

In short, we find no error in the record, and the judgment must be affirmed.

CONTRIBUTORY NEGLIGENCE OF PARENT BARS HIS RECOVERY, BUT NOT MINOR CHILD'S. — The contributory negligence of a parent will bar his right to recover for injury to his minor child, but such contributory negligence on the parents' part cannot be interposed as a defense to bar a recovery for the benefit of the minor: *Western U. Tel. Co. v. Hoffman*, 80 Tex. 420; 26 Am. St. Rep. 759, and note, with cases collected; extended note to *Bris etc. R'y Co. v. Schuster*, 57 Am. Rep. 474.

RAILROADS — PURCHASE OF TICKET BEFORE ENTERING TRAIN. — A railroad company has power to make all reasonable rules for the government of its trains, and may, as to certain trains, require tickets to be purchased before allowing passage to be taken thereon: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133, and note; note to *Commonwealth v. Power*, 41 Am. Dec. 473. A railroad may make a rule that no one be allowed to board a train without first exhibiting a ticket to a gate-keeper: *Dickerman v. St. Paul etc. Depot Co.*, 44 Minn. 433. A railroad may refuse to carry a passenger without the previous procurement of a ticket: *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818.

TRIGG v. CLAY.

[88 VIRGINIA, 330.]

SALES — BREACH OF CONTRACT — MEASURE OF DAMAGES. — Upon the breach of a contract to furnish goods, the measure of damages, when similar goods may be purchased in the market, is the difference between the market price at the place of delivery and the contract price agreed to be paid.

SALES — BREACH OF CONTRACT — MEASURE OF DAMAGES. — Upon the breach of a contract to furnish goods which have been resold by the buyer before delivery, when he cannot purchase similar goods in the market, the measure of damages is the difference between the contract price and the price at which they have been resold.

SALE — MEASURE OF DAMAGES FOR BREACH OF CONTRACT OF. — All damages resulting necessarily, immediately, and directly from the breach of a contract of sale are recoverable, but not those that are contingent and uncertain.

Daniel Trigg, for the appellants.

Holdman and Ewing, and *J. J. A. Powell*, for the appellees.

LACY, J. The suit is a foreign attachment in equity, brought to attach the property, situated within the jurisdiction of the court, belonging to the non-resident defendants, and to subject the same to the satisfaction of the debt of the plaintiffs. The case is, briefly, as follows: —

The appellants, a firm of lumber merchants resident at Abingdon, in Virginia, made a contract by which they agreed to buy, at a stated price, lumber of agreed dimensions, from the appellees, a firm of lumber-getters, resident at Rogersville, in the state of Tennessee, the lumber to be delivered at Clinchport, in Scott County, in Virginia, from five hundred thousand feet to seven hundred thousand feet thereof, and the plaintiffs agreed to accept the drafts of the said appellees to the amount of three thousand dollars. And on the twenty-eighth day of November, 1888, the date of the contract, the appellee H. B. Clay, Jr., of the said firm, represented to the appellants that three hundred thousand to four hundred thousand feet were already cut and dry or drying, and that the residue necessary to compensate for the three thousand dollars in drafts, to be accepted at sixty days, should be delivered at Clinchport at the maturity of the drafts. The drafts were all made in the first week in December, 1888, a few days after the contract was made, which was on the twenty-eighth day of November, as has been stated. The lumber was not delivered, not a foot of it, and the drafts were neglected and allowed to fall upon the hands of the plaintiffs, when the lumber had not yet been delivered and the drafts had been paid. So the plaintiffs, as had been agreed between the parties in case the said contingency should arise, that the drafts should have to be paid before the lumber in sufficient had arrived, drafted back upon the defendants for the money thus paid out; but this action was treated with derision by the appellee, and the draft dishonored. Upon the hearing, the circuit court decreed in favor of the plaintiffs for the three thousand dollars paid on the draft, and the costs of protest, etc., and referred it to a commissioner to ascertain what damages the plaintiffs had sustained. It was proved that the defendants had absolutely refused to fulfill the contract, upon the ground that the lumber had been priced too low by them, and also refused to refund the money paid them under the contract. The plaintiffs proved that they were lumber merchants, and, as was known to the defendants, purchased the lumber for sale; and they proved that they had actually placed this lumber to their customers at a profit which amounted to one thousand dollars, but which they were made to lose by the wrongful act and fraudulent conduct of the defendants, and the commissioner reported that the said plaintiffs were entitled to this sum of actual damages incurred by them, estimating the profits on

the maximum amount of the lumber to be delivered under the contract. But the defendants excepted to this report, "because the damage allowed is excessive and not supported by law, because the commissioner had based his damages on supposed profits instead of the market value of the lumber at the places of delivery."

The circuit court, by its decree of March 27, 1890, sustained these exceptions, and held that the plaintiffs were entitled to no specific damages for the non-performance of the contract set out in the plaintiff's bill, and rested the matter where it had been placed by former decree, which decreed in favor of the plaintiffs for the amount paid on the said drafts.

From this decree the appeal is here. The idea of the circuit court was, that the general rule applied, which fixed the difference between the market price at the place of delivery and the contract price agreed to be paid, upon the principle that the buyer could supply himself in the market overt, and when he had been compensated for the excess in the cost over and above what his cost would have been under the contract, he had nothing more to complain of.

But this case does not come within that principle,— 1. Because there is no market at that place from which or in which the plaintiffs could supply their need; 2. Because there is no other market practically near enough to purchase the lumber and add transportation to the market price; 3. Because the plaintiffs, relying on the promises and good faith of their bargainers, as they had a right to do, when they had themselves fully complied on their part by paying the purchase-money therefor, had contracted to sell this lumber at a profit, which profit is the basis on which the commissioner assessed his damages.

In a case like this, with such circumstances as we have here, the case where there had been a contract to resell them at an agreed price, and when there is no market to afford a surer test, the price at which they were bargained to a purchaser affords the best, and indeed very satisfactory, evidence of their value. This was a purchase in that market, and there was no more for sale. In a case of such actual sale, why should the court go into conjecture as to what the goods were there worth? And again, if lumber could have been purchased and brought there at a lower price, there is not only no proof of it, but we have satisfactory proof to the contrary, because the defendants had the lumber, and were, by

their solemn contract, under the highest obligations to deliver it, to say nothing of the requirement of common honesty, when they had agreed to do it and had collected the purchase price. And yet they preferred to break their contract, and dishonored their bank obligation, rather than deliver this lumber at the agreed price, which they declared had been bargained at too low a price.

In Wood's *Mayne on Damages*, section 32, it is said: "But if they [the goods] cannot be purchased for want of a market, they must be estimated in some other way. If there had been a contract to resell them, the price at which such contract was made will be evidence of the value."

In the *American and English Encyclopædia of Law* it is said: "Where there is no market at the place of delivery, the price of the goods in the nearest market, with the cost of transportation added, determines their value": *Washington Ice Co. v. Webster*, 68 Me. 468; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718.

In the case of *Culin v. Woodbury Glass Works*, 108 Pa. St. 220, it is said: "Upon the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the non-delivery."

A distinction is drawn in some of the cases between a resale made at an advance subsequent to a contract of purchase and a resale made at an advance before the contract of purchase, which was known to the seller of the goods: *Carpenter v. First National Bank*, 119 Ill. 354.

This is rather a fanciful distinction. It is not in accord with the ordinary usages of trade that a dealer—a man buying to sell again—should disclose his dealings with the same goods at a profit to his vendor. But if there were any sound principle upon which this could rest,—if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest,—still, in this case, it is reasonable to suppose that a lumber-getter, selling seven hundred thousand feet of lumber to a dealer in lumber, should know,—1. That it was for a resale; 2. That this resale was to be on a profit; and 3. That he should know that his vendee would be damaged to the amount of his profit if the vendor should prove faithless.

But the true basis of the general rule is, that when there is a market, the vendee cannot be damaged except in the differ-

ence between what the lumber did actually cost him and what he had purchased it at from the seller to him. But this rule can have, upon reason, no application whatever to a case where there is no market,—1. Because the disappointed purchaser cannot buy in that market when there is no market to buy in; and 2. Because the market price cannot be ascertained when there is no market.

Under the circumstances of this case, the commissioner ascertained the true and just amount of the damages.

It has been often held that profits which are the direct and immediate fruits of the contract are recoverable. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages: Wood's *Mayne on Damages*, p. 82. It has been held that when the defendant refused to allow the contracts to be executed, the jury should allow the plaintiffs as much as the contract would have benefited them. Profits or advantages which are the direct and immediate fruits of the contract entered into between the parties are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. If the inducement to the plaintiffs to buy this lumber, they being lumber dealers and trading in lumber, was not the profits they were to make by a resale, what was their inducement? And if the sellers did not understand and contemplate this resale on a profit, what contemplation on the subject can be reasonably ascribed to them? See *Masterton v. Mayor of Brooklyn*, 7 Hill, 62; 42 Am. Dec. 38; *Morrison v. Lovejoy*, 6 Minn. 324; *Fox v. Harding*, 7 Cush. 516; *Devlin v. Mayor etc.*, 63 N. Y. 8; *McAndrews v. Tippet*, 39 N. J. L. 105; *Kendall Bank Note Co. v. Commissioners of the Sinking Fund*, 79 Va. 563; *Bell v. Reynolds*, 78 Ala. 511; 56 Am. Rep. 52.

An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract,—in other words, for the benefits and gain he would have realized from its performance, and nothing more.

It is sometimes said that the profit that would have been derived from the performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which certainly would have been realized but for the defendants' default are recoverable. It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit can be derived at all.

It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remark will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach.

Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain.

The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result of the breach, but uncertain in amount, that the plaintiff will be fully compensated by recovering the value of his bargain.

He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining the amount: *Wakeman v. Wheeler etc. Mfg. Co.*, 101 N. Y. 205; 54 Am. Rep. 678; *Taylor v. Bradley*, 4 Abb. App. Dec. 363; *Bell v. Reynolds*, 78 Ala. 511; 56 Am. Rep. 52.

In this case, the report of the commissioner was upon the correct principle, and the circuit court erred in sustaining the defendants' exception to the said report, for said exceptions should have been overruled and the commissioner's report confirmed. The decree of the circuit court appealed from here is therefore erroneous, and the same will be reversed and annulled, and this court will render such decree as the said circuit court ought to have rendered.

LEWIS, J., dissented from the opinion of the court, on the ground that the contracts made by the appellants for the sale and delivery of the lumber to other parties were collateral, and subsequent in point of time to the contract in suit, and for this reason, such contracts could not have been in the contemplation of the parties at the time the latter contract was made.

DAMAGES FOR FAILURE TO DELIVER GOODS. — The measure of damages in an action for failure to deliver goods sold is the difference between the contract price and the market value at the time of default: *McKnight v. Dunlop*, 5 N. Y. 537; 55 Am. Dec. 370; *Cohen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203. Such market value is to be estimated with reference to the place of delivery: *Denver etc. R. R. Co. v. Hutchins*, 31 Neb. 572; *Trunkley v. Hedstrom*, 131 Ill. 204; *Frazier v. Clark*, 88 Ky. 260; *McDonald v. Unaka Timber Co.*, 88 Tenn. 38.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT. — Merely speculative or remote damages by reason of a breach of contract are not recoverable: See cases cited in notes to *Van Winkle v. Wilkins*, 12 Am. St. Rep. 303, and *Stanton v. New York etc. R. R. Co.*, 21 Am. St. Rep. 121. In the same notes will be found references to cases illustrating the nature of the losses for which compensation may be claimed. See also *Sherman Center etc. Co. v. Leonard*, 46 Kan. 354; 26 Am. St. Rep. 101. Those losses must be such as may fairly be supposed to have been in the contemplation of the parties when they made their contract, or such as, according to the ordinary course of things, might be expected to follow its violation: *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340; 25 Am. St. Rep. 536; *Hutchinson v. Snider*, 137 Pa. St. 1. Profits or advantages are not an element of damages, unless they are the direct result and fruits of the contract: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806. The above principles are well illustrated in the recent case of *Leonard v. Beaudry*, 68 Mich. 312, where a mill-owner brought suit for the non-delivery of logs which the defendant had contracted to supply. The plaintiff had thus been put to considerable expense through the difficulty of procuring suitable logs for the manufacture of the lumber which she had agreed to furnish, and had also suffered the loss of profits which would have been made if the mill had continued in operation. The court said: "When the contract is executory, and the time of performance has expired, and the elements out of which the profits were to arise can be ascertained and proved with reasonable certainty, and especially where the compensation for performance is fixed by the parties, there is no reason why the difference between the cost of performance and compensation agreed upon should not be recovered as actual damages suffered by the aggrieved party, whether they be called gains prevented or loss of profits. Such damages are the direct consequences of the breach of contract, and courts have always allowed them."

In this Michigan case, however, the plaintiff had used her best endeavors to procure a supply of logs, and by utilizing such materials as were available, had performed the duty which is incumbent on the contractee in such cases to do what can reasonably be effected to keep down the damages: See note to *Wright v. Bank of Metropolis*, 6 Am. St. Rep. 365, and cases cited. The court, in the principal case, was apparently of opinion that the circumstances were such as to excuse the plaintiff from the performance of this customary duty, since "there was no other market practically near enough to purchase the lumber, and add transportation to the price." What the conditions were — extraordinary as they must have been — which precluded the plaintiff from obtaining a supply of an article so common as lumber, we are not informed. But even if the plaintiff should have taken no action, and the market value at place of delivery be incapable of direct proof, it may be shown indirectly by proof of market value at other convenient and accessible points: *McDonald v. Unaka Timber Co.*, 88 Tenn. 38. It would certainly be somewhat difficult to name a place in any of the settled dis-

tricts of this country where such a rule could not be readily applied in the case of lumber products. So far as the contents of the opinion are concerned, we have no means of deciding whether the place of plaintiff's residence was of the exceptional character which would alone justify a departure from what is admitted to be the general rule. But assuming that facts not stated really rendered it impossible for the plaintiff to supply his need, it seems hardly necessary, for the purposes of the decision, to refer as the court has done to the evidence of market value afforded by the agreement of the defendant to sell at a certain price. The essential question in such a case as the principal one is, whether the goods can be procured elsewhere at such a price that, when transportation is added, the plaintiff will make some profit on the resale. If the goods can be so procured, the general rule may readily be applied, by which the defendant will be liable for the difference between the amount for which he had agreed to sell and the amount which plaintiff was compelled to pay in order to supply the deficiency. A similar result as regards defendant's liability would follow, where the plaintiff makes no attempt to keep down the damages by seeking the goods in the most convenient market, the price at which he might have purchased, instead of the price actually paid, being the standard for computing the damages. But if the goods cannot be procured at all by reasonable diligence, all evidence of market value would seem to be immaterial. Knowledge of the consequences of non-fulfillment of the contract would properly be imputed, under such circumstances, to one who must be presumed to be acquainted with the course of the particular business in which the default was made, and he cannot complain if he is made liable for the loss of the entire profits which he has intercepted.

CHALKLEY v. CITY OF RICHMOND.

[88 VIRGINIA, 402.]

MUNICIPAL CORPORATIONS — LIABILITY FOR SEWERS NEGLIGENCELY CONSTRUCTED. — When a sewer controlled by a city is so negligently constructed or altered by a private individual under authority and aid from the city as to cause water and filth to flow upon private property, which would not otherwise have flowed there, the city is liable in damages for the injury resulting therefrom.

MUNICIPAL CORPORATIONS — DEFECTIVE SEWERS. — A sewer controlled by a city, which is so negligently constructed or altered as to cause water and excrement to flow into the cellar of a private owner, is a nuisance for which the city is liable in damages, after notice to abate it.

MUNICIPAL CORPORATIONS — LIABILITY FOR NUISANCE. — A city authorized to abate a nuisance is, after notice of its existence, liable for failure to exercise the power.

McGuire and Ellett, for the plaintiff in error.

C. V. Meredith, for the defendant in error.

FAUNTLEROY, J. The pleadings and the proofs presented by the record disclose the following case:—

The firm of B. D. Chalkley, manufacturers, importers, and dealers in leather and shoe findings, from the twentieth day of August, 1885, to the twentieth day of August, 1889, occupied, as their store, the storehouse No. 17 South Thirteenth Street, situated on the east side of said street, between Main and Cary streets, with a cellar under it and several stories above. Under the sidewalk of the street, in front of the said cellar, about two and a half feet below the surface, and within about six inches of the wall of the said cellar, there runs a culvert three feet wide by two and one half feet deep. The said culvert was, during the whole period from August 20, 1885, to August 20, 1889, out of repair, and had been for many years prior out of repair. It is without stone bottom, and the sides, walled with rough granite spalls, from which the cement (if any was ever there) has been long since washed away, did not confine the water and filth flowing in said culvert. The said culvert is wholly under the public sidewalk. It is not shown when it was put there, or by whom, but that it was there as early as 1824 or 1820. As early as September 15, 1834, the city of Richmond assumed control of the said culvert, and by a resolution of its common council of that date, reciting that "the large culvert which conveys filth from the Capitol Square, the Eagle Tavern, and divers other places, is now out of order, and will require considerable expense to keep the same in order," etc., directed its commissioners of streets to have the said culvert (which was this culvert) repaired, and to draw on the city chamberlain (the city bursar) for the cost thereof. This control of the said sewer or culvert was further exercised by the city of Richmond when its street commissioners (members and appointees of the city council) "resolved, May 11, 1835, that the repairs reported to be necessary to the culvert in Exchange Alley (which is the extension of this culvert) be done"; and when, in 1877, the city authorities gave formal record permission to A. Y. Stokes & Co., and appropriated \$250 to aid them, to remove and change the course of this said "water-pipe," or sewer, or culvert; and again, when, in 1887, the said city opened the said culvert and undertook to repair the same, and to remedy (though negligently and inadequately) the very evil for which this action was brought. In 1877 this culvert or sewer was changed in its course, on the petition of A. Y. Stokes & Co., by the formal consent of the city of Richmond, under the supervision of its engineer, and with the aid of its funds appropriated for that purpose;

and whereas it ran, before it was so altered, by easy curves, so that its contents flowed off easily, the new construction or alteration made a sharp angle in the said culvert or sewer, whereby the flow of the filthy water and excrement was obstructed, and backed and made to flood the cellar of the plaintiff. By reason of the aforesaid defects and want of repair of the said culvert, and the said alteration of its course, made by the consent and money aid of the city of Richmond, under the supervision and direction of its city engineer, the water-closet water and excrement filth penetrated and leaked and flowed into the cellar of the plaintiff, and grew worse and worse from the time when notice was given to the city of Richmond, in 1885, down to the 20th of August, 1889. Every effort was made by the plaintiff and the owners of the property to have the said leak repaired and prevented, by employing skilled workmen for that purpose, placing pipes under the floor to carry off the water, building a new wall on the inside of the original cellar wall, and by stopping the crevices, washed in the cellar wall by the said leaks, with pieces of brick driven in and cemented. These efforts were all unavailing, and the workmen refused to undertake further a useless job, — leaving no remedy except the repair or reconstruction of the culvert. The effect of this influx of water and filth on the business of the plaintiff, and upon the health of himself, customers, and employees, was disastrous in the extreme, and occasioned to him a money damage of about five thousand dollars. The whole storehouse was rendered damp and less useful for plaintiff's business, and he was deprived, for the most part, of the use of the cellar, which was the most useful and valuable room in the house, while the whole storehouse was filled with foul air and unwholesome stench dangerous to health of plaintiff and his employees. The course of this culvert or sewer is from near the corner of Twelfth and Bank streets, under the Planters' National Bank, and Anderson's and Block's stores, numbers 1204 and 1210 East Main Street, across Main Street, under Putney and Watts, 1219 East Main Street, across Thirteenth Street, in front of the plaintiff's storehouse, under the sidewalk, and down Lombard Alley. It was proved to drain the capitol, the governor's house, Planters' National Bank, Anderson's and Block's stores, and all houses on the south side of Main Street between Twelfth and Thirteenth streets, and the American Hotel and Adam's Bakery. How many more it drains could not be shown, but a large stream of

filth and water runs therein,—“enough to turn a mill almost.” The fountains on the eastern side of the Capitol Square also drain into this culvert, and the lower eastern fountain, near Bank Street, particularly, was put there and drained into this culvert by the city of Richmond. All the water drained into this culvert, except such as is surface flow, is city water,—diverted from James River and brought into the city, and distributed by it through its water-works and pipes, and furnished to the water-takers for pay; and the state pays the city of Richmond for the water furnished the capitol and the governor’s house. The condition, produced by this defective and out-of-repair culvert, in the cellar and storehouse of plaintiff was and is a nuisance, and it was so reported to the health department of the city by its sanitary inspector, who says in his testimony: “Complaint was made to the board of health office. I was sent by Dr. Stratton to see what the trouble was. I found water coming in from the front wall of the house, apparently from the street. The cellar was in quite a bad condition, I thought, from the effect of the water, and not very pleasant to smell. I reported the case to the board of health with the idea of having it investigated, not believing at the time that Mr. Chalkley could help the nuisance being there, because he was complaining very bitterly of it. Our object was to get the nuisance abated as soon as possible as a sanitary measure. . . . Water percolated from the street through the front wall.”

These facts are averred in plaintiff’s declaration, and are all proved by the evidence in the record.

The court overruled the demurrer to the whole declaration and to the first and second counts, but sustained the demurrer as to the third count. Upon these facts, and an instruction given by the court, after refusing to give instructions asked for by the plaintiff, the jury found a verdict for the defendant city, which verdict the plaintiff moved the court to set aside as contrary to the law and the evidence, and to grant to him a new trial. But the court overruled the said motion, and gave judgment against the plaintiff with costs, in accordance with the said verdict. The case is here by a writ of error to this judgment. The judgment of the circuit court is erroneous, both upon the law and the facts of the case.

The third count of the declaration sets out a good cause of action, and the demurrer to it should have been overruled. It does not charge or implicate the ownership of the culvert,

nor the responsibility for it as it was and as it operated originally; it merely alleges its course and its sufficiency, until interfered with by the city, to carry off all the water and filth flowing in it, without damage or annoyance to the store of plaintiff or its occupants, and its subsequent insufficiency to do this, by reason of the alteration in its course and shape made by the city, or under its direction, and the nuisance created and the damage done thereby. The truth of these allegations is admitted by the demurrer.

The code of Virginia, section 1038, gives every city in the state the power (and the correlative duty) to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated. The charter of the city of Richmond gives it the same power and imposes the same duty. It has ample power to make and regulate its whole system of water-works, sewerage, and drainage. It has full power over its streets and their sidewalks, which are parts of the street: Bishop on Non-Contract Law, sec. 977; *City of Bloomington v. Bay*, 42 Ill. 503. It may build bridges in and culverts under its streets, and may prevent or remove any structure, obstruction, or encroachment over or under or in a street or alley, or any sidewalk thereof. Its city engineer is the general superintendent of its streets, culverts, and all public improvements, and it is his duty to report all encroachments, nuisances, or obstructions thereon. For the execution of all these powers and duties, the city has ample power of taxation and assessments.

“A city is liable for an injury to the plaintiff by flooding it with water, not only where such injury is caused by neglect to keep a sewer in repair, but as well where it is the negligent or necessary result of the constructing of the sewer”: Dillon on Municipal Corporations, sec. 1015. “The city is liable for a tort when it pours upon the premises of the citizen a flood of water and filth, or either, by a public sewer so constructed (or altered) that the flood must be the necessary result”: Chief Justice Cooley, in *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; Dillon on Municipal Corporations, sec. 1045, note 2. “A like excess of jurisdiction appears when, in the exercise of its powers, a municipal corporation creates a nuisance, to the injury of an individual”: *Ashley v. Port Huron*, 35 Mich. 301; 24 Am. Rep. 552.

“Courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed as to cause a posi-

tive and direct invasion of plaintiff's private property, as by collecting and throwing upon it, to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles": Dillon on Municipal Corporations, sec. 1047. "The distinction is, that the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial": Chief Justice Cooley, in *Ashley v. Port Huron*, 35 Mich. 300; 24 Am. Rep. 552. "Where the injury is occasioned by the plan of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily, if ever, any liability. This, also, is everywhere admitted as generally true; but in the case last supposed, there will be a liability if the direct effect of the work, particularly if it be a sewer or drain, is to collect an increased body of water, and to precipitate it onto the adjoining private property, to its injury": Dillon on Municipal Corporations, sec. 1051. "There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of sewers, or the negligent failure to keep the same in repair and free from obstructions. The cases support this proposition with great unanimity": Dillon on Municipal Corporations, sec. 1051.

The city of Richmond cannot escape liability for the damage done to the rights of property, health, and comfort of the plaintiff by the alteration made in the sewer by Stokes & Co., by permission of the city, under the supervision of its agents and by its money aid. "A person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole the same as though he had done all without help": Bishop on Non-Contract Law, secs. 518, 525; Wood on Nuisances, 2d ed., 896, note. Upon the facts alleged in the first and second counts of the declaration and established by the evidence, the city of Richmond is liable upon the ground of nuisance. That the culvert in question, in its then condition, and by the injury produced by it, was a nuisance is proved by the record; and it is as fully proved that the city had assumed and exercised control and absolute authority over it, and had ample power to repair it, or to remove obstruction in it. "Authority to

preserve the health and safety of the inhabitants, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance": *Dillon on Municipal Corporations*, sec. 379.

"When a municipal corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety, or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it": *Wood on Nuisances*, sec. 749.

"A city authorized to abate nuisances is liable for failure to exercise the power": *Kiley v. Kansas*, 69 Mo. 102; 33 Am. Rep. 491; *Parker v. Mayor of Macon*, 39 Ga. 729; 99 Am. Dec. 486; *Noble v. City of Richmond*, 31 Gratt. 271; 31 Am. Rep. 726; *Orme v. City of Richmond*, 79 Va. 86; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122; *City of Joliet v. Verley*, 35 Ill. 58; 85 Am. Dec. 342; *City of Bloomington v. Bay*, 42 Ill. 503; *Clark v. Town of Epworth*, 56 Iowa, 462; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Logansport v. Wright*, 25 Ind. 512; *Emery v. Lowell*, 104 Mass. 13; *Clayburgh v. City of Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *Springfield v. Le Claire*, 49 Ill. 476; *Kranz v. Mayor of Baltimore*, 64 Md. 491; *Houfe v. Town of Fulton*, 34 Wis. 608; 17 Am. Rep. 462.

"A corporation has no more right to license or maintain a nuisance than an individual would have, and for a nuisance maintained on its property, the same liability attaches against a city as to an individual": *Dillon on Municipal Corporations*, secs. 374, 1048, note 2. "The king cannot license the erection or commission of a nuisance, nor can a municipal corporation do so": *Dillon on Municipal Corporations*, secs. 660, 1038, note 1.

The record does not show who built or first established the sewer, nor is that an essential inquiry in the case, the pivotal question being, whether the city of Richmond had assumed and exercised control over it, and made practical use of it for the public. The proof is full and undeniable that the city assumed and exercised control over it as early as 1834, and has repeatedly since emphasized that control by altering and repairing it, and by giving authority in her municipal capacity to others to do so, and appropriating money and furnishing labor, implements, and official supervision and direction

of the work. The plaintiff asked for instructions based upon the case made by the evidence, which properly expound the law, and which should have been given, but the court, refusing these, instructed the jury: "If the jury believe from the evidence that the culvert or sewer complained of was built by the state of Virginia, then they should find for the defendant." This instruction was erroneous, as it shut the jury up to the sole and immaterial inquiry, who, way back in the dim and remote past, may have originally built the sewer, and withdrew from their consideration the most material and all-important fact established by the evidence in the case, that the city of Richmond had assumed and adopted the sewer for the use of her public, and had exercised unquestioned and continuous control over it as a subject of her municipal jurisdiction and administration.

The judgment complained of is wholly erroneous, and is reversed and annulled, and the case will be remanded for a new trial, with directions to the circuit court to give the instructions asked for by the plaintiff if the evidence shall be the same, and for further proceeding in accordance to the views of this court.

Municipal Corporations—Sewers—Liability for Defects in and Want of Repair of.*

Failure to Provide, or Defect in Plan. — It is well settled that the exercise of the duty, on the part of a municipality, to provide sewers or drains is in its nature *quasi* judicial or legislative, requiring the exercise of judgment and discretion as to the time when and the mode in which it shall be undertaken, or the adoption of the best plan which the means at the disposal of the corporation renders it practicable to adopt; and consequently, the corporation is not liable in damages for wholly failing to provide sewerage or drainage: *Mills v. Brooklyn*, 32 N. Y. 489; *Wilson v. Mayor of New York*, 1 Denio, 595; 43 Am. Dec. 719; *Mayor of Savannah v. Spears*, 66 Ga. 304. In *Hitchins v. Mayor of Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 70 Md. 56, it was decided that the power conferred by its charter upon a municipal corporation to construct drains and sewers as in its judgment the public convenience may require, and to repair the same, when needed, is discretionary or *quasi* judicial, which the corporation cannot be compelled to execute, unless the terms of the statute are imperative.

Some conflict of authority exists as to whether or not a city is liable for the adoption of a defective or inefficient plan of sewerage or drainage; but the weight of authority sustains the proposition, that in the mere adoption

*** REFERENCE TO MONOGRAPHIC NOTES.**

Sewers, liability for decision respecting time, mode, place of building, and deficiency of: 66 Am. Dec. 435.

Sewers, liability to private action for not providing: 20 Am. Rep. 626-631.

Sewers, liability for damages caused by: 24 Am. Rep. 556, 557.

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of the plan, a municipality acts in a judicial or legislative capacity, and is not liable for defects therein, or for errors or want of judgment upon which its sewerage or drainage is devised: *Mills v. Brooklyn*, 32 N. Y. 489; *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Johnston v. District of Columbia*, 118 U. S. 19; *Attwood v. Bangor*, 83 Me. 582; *Wicks v. Dewitt*, 54 Iowa, 130; *Fair v. Philadelphia*, 88 Pa. St. 309; 32 Am. Rep. 455; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622; *Foster v. St. Louis*, 71 Mo. 157; *City of Denver v. Capelli*, 4 Col. 25; 34 Am. Rep. 62, where it was said: "The law confers a power, judicial in its nature, upon the city to construct all necessary drains and sewers; but until that power is exercised, it imposes no legal duty upon the city authorities. The distinction between the power of the city and its legal, as separate from its political, duty must be kept steadily in mind. As long as the city authorities fail or refuse to exercise their discretionary powers, no liability attaches. . . . For a mere error of judgment in the plan or system adopted, it cannot be made to respond. If the municipality fails to act, or if acting, it adopts a plan, however inefficient, and constructs its drains in conformity thereto, and injury results to an individual in consequence of the plan being defective, or of the drains not being of sufficient size to accommodate all the water which, if the drains were larger, would naturally flow through them, there is no resulting liability to the city." In *Fair v. Philadelphia*, 88 Pa. St. 309-311, 32 Am. Rep. 455, the court said: "The time and manner of draining the streets of the city require the exercise of judgment, deliberation, and discretion of the municipal authorities. The duty is therefore one of a judicial character. It involves a consideration of the financial condition of the city, and of the time and plan of construction. It must, therefore, be left to the municipal authorities to determine the extent and capacity of the sewerage to be constructed, and not to the verdict of a jury to decide at the suit of an owner of property aggrieved. So long as it is the mere omission, as here, of the authorities to provide adequate means to carry off the water which storms and the natural formation of the ground throw on a lot, the owner thereof cannot sustain an action against the municipality. This conclusion flows from the sound rule that a municipality is not liable for damages resulting from a lawful exercise of its discretionary power to plan and construct sewers." So in *Johnston v. District of Columbia*, 118 U. S. 19, the court said: "The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land." This general rule is somewhat limited by the case of *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507, in which it was determined that municipal corporations are not liable for injuries resulting from the plan of a public work, as distinguished from its mode of execution, unless such plan must necessarily result in a direct invasion of private property.

Some cases of respectability are found which maintain that a city is liable for unskillfulness in planning a sewer, whereby damage results to private property. These cases seem to proceed upon the theory that in planning a sewer the city acts in a ministerial, and not in a judicial, capacity: *Seymour v. Cummins*, 119 Ind. 148; *Monroeville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86;

Rochester etc. Co. v. Rochester, 3 N. Y. 463; 53 Am. Dec. 316; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 522; *Lehn v. San Francisco*, 66 Cal. 76, where the court said that "the defendant is responsible for damages caused as alleged in the complaint, even if it was part of a plan adopted by the board of supervisors that the sewers mentioned in the complaint should be left open at places through which their contents flowed on plaintiff's land." In Indiana, the rule prevails that "a municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the municipal corporation is liable; but if the inadequacy of the sewer is attributable to a mere error of judgment, there is no liability": Per Elliott, J., in *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; citing *North Vernon v. Voegler*, 103 Ind. 314; *Crawfordsville v. Bond*, 96 Ind. 236; *Evansville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86; *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Weis v. Madison*, 75 Ind. 241; 39 Am. Rep. 135; *Indianapolis v. Huffer*, 30 Ind. 235. And to the same effect: *Roll v. Indianapolis*, 52 Ind. 547; *Leeds v. Richmond*, 102 Ind. 372; *Rosell v. Anderson*, 91 Ind. 591; *Terre Haute v. Hudnut*, 112 Ind. 542; *Seymour v. Cummins*, 119 Ind. 148.

On this subject, Judge Dillon, in 2 Dillon on Municipal Corporations, sections 1046-1047, says: "The later cases tend strongly to establish, and may, we think, be said to establish, and in our judgment rightly to establish, that a city may be liable on the ground of negligence in respect to public sewers, solely constructed and controlled by it. Where, by reason of their insufficient size, clearly demonstrated by experience, they result, under ordinary conditions, in overflowing the private property of an adjoining or connecting owner with sewage, and that the principle of exemption from liability for defect or want of efficiency of plan does not extend to such a case. It is, perhaps, impossible to reconcile all of the cases on this subject, and courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted."

Liable for Negligent Construction. — The authorities are numerous and uniform in holding that after the adoption of a plan of sewerage or drainage by a city, the manner of its execution by it becomes, with respect to the rights of the citizen, a mere ministerial duty, and that for any negligence and unskillfulness in the execution or construction of the work, whereby injury is inflicted upon a private right, the municipality will be responsible. In other words, a municipal corporation is required to execute the work of constructing a public improvement, such as a sewer, in a careful and skillful manner, and if, by reason of the neglect or want of skill of the persons engaged in the work, the property of a citizen is injured, the city is liable. When a municipality undertakes the construction of a sewer or drain, it is bound to exercise the same degree of care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an in-

dividual, for damages resulting from negligence or omission of duty: *Montgomery v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562; *Wallace v. Muscatine*, 4 G. Greene, 373; 61 Am. Dec. 131; *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622; *Thurston v. St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Logansport v. Wright*, 25 Ind. 512; *Smith v. Mayor etc. of New York*, 66 N. Y. 295; 23 Am. Rep. 53; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Foster v. St. Louis*, 71 Mo. 157; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *Barton v. Syracuse*, 36 N. Y. 54; *Mayor etc. of Savannah v. Spears*, 66 Ga. 304; *Leeds v. Richmond*, 102 Ind. 372; *Simmer v. St. Paul*, 23 Minn. 408; *City of Denver v. Rhodes*, 9 Col. 554; *City of Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591; *Hitchins v. Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *Attwood v. Bangor*, 83 Me. 582. A few cases will suffice to explain and illustrate this rule. Thus, where a municipal corporation undertakes to build culverts or sewers, it is bound to exercise reasonable care in the execution of the work; and if, by reason of negligence in the construction of a sewer, the drainage, instead of flowing through it, is dammed up and discharged with injurious force upon private property, the municipality is liable for the amount of injury done: *Mayor etc. of Frostburg v. Hitchins*, 70 Md. 56.

When a city introduces water within its limits for manufacturing purposes, and by turning the water into its drains increases the flow of water upon adjoining land, to its injury, the municipal corporation is liable for the damage done, although the increased water is thrown upon such land to prevent the drain from overflowing its banks, or by reason of the actual overflow of such banks, provided the land would not have been overflowed without the drain: *Phinizy v. Augusta*, 47 Ga. 260. If it is the duty of a private corporation to keep a raceway leading to its works in repair, and a city so constructs a sewer as to deposit dirt and gravel in the raceway, and obstruct the flow of water therein, compelling the corporation to expend money to remove the obstruction so caused, the city is liable for the money so expended: *Elgin etc. Co. v. Elgin*, 74 Ill. 433. If the corporate authorities of a borough, after notice, suffer a public culvert, of sufficient capacity in itself, to be extended through private property, reduced in capacity so as to be insufficient to carry the ordinary flow of water, the corporation is liable to a property owner for the resulting injury: *Haus v. Bethlehem*, 134 Pa. St. 12. If a city, in constructing a sewer, negligently uncovers a water pipe and leaves it exposed, so that the water therein is allowed to freeze, thus cutting off the supply of a party with whom the city is under contract to furnish water, to his injury, the city is liable for the damages sustained by him: *Stock v. Boston*, 149 Mass. 410; 14 Am. St. Rep. 430. It naturally follows from these cases that if a municipal corporation exercises due and reasonable care and skill in the construction of its sewers and drains, it is not liable for any consequential damage arising to property owners: *City of Vincennes v. Richards*, 23 Ind. 381; *Roll v. Indianapolis*, 52 Ind. 547; *Rosell v. Anderson*, 91 Ind. 591; *Collins v. Philadelphia*, 93 Pa. St. 272.

Duty to Keep in Repair. — When a municipal corporation, after a sewer or drain has been constructed in a public street under its supervision, assumes the control and management of it, it is bound to use reasonable diligence and care to keep such sewer or drain in good repair, and is liable in damages to any property owner injured by its negligence in this respect: *Taylor v. Austin*, 32 Minn. 247; *Mayor of Savannah v. Spears*, 66 Ga. 304; *Mayor of Savannah v. Cleary*, 67 Ga. 153; *Barton v. Syracuse*, 36 N. Y. 54; *Nims v. Troy*, 59 N. Y. 500; *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *Smith v. Mayor*

etc. of New York, 66 N. Y. 295; 23 Am. Rep. 53; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Hitchins v. Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *Bates v. Westborough*, 151 Mass. 174; *Young v. City of Kansas*, 27 Mo. App. 101; *Markle v. Berwick*, 142 Pa. St. 85. In *McCarthy v. Syracuse*, 46 N. Y. 194, the rule is stated to be, that where the duty is imposed upon a city to keep a public structure, such as a sewer, in repair, it involves the exercise of a reasonable degree of watchfulness, in ascertaining the condition of such structure from time to time, and when this is omitted, the municipality is liable for damages resulting from a dilapidated condition of the structure, which is the ordinary result of its use, and which would have been disclosed by an examination. In such case, no notice of the defect is necessary. A city is liable for damages caused from flooding private premises by reason of a defective sewer, or by the neglect of its officers to keep the sewer in repair after knowledge of its defective condition. It is immaterial whether the water doing the damage comes from a natural watercourse turned into the sewer by the city authorities, or from surface water flowing into the sewer. It is the duty of the city, when it provides waterways, to provide such as are sufficient to carry off the water that reasonably might be expected to accumulate: *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158. In maintaining a public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was his own: *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464. When a sewer becomes obstructed or choked, and is thereby rendered inefficient to perform the purposes for which it was constructed, the city is liable for damage caused by the condition of the sewer, if, after notice, it fails to remove the obstruction: *Hichins v. Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *Smith v. Mayor of New York*, 66 N. Y. 295; 23 Am. Rep. 53. Thus while a city is only bound to exercise ordinary diligence in regard to preventing injury from a canal forming a part of its system of sewers, still its diligence must extend not merely to keeping up such banks as a drain may have, but to keeping the canal open and in such order as to protect the proprietors of adjacent lands, regard being had to the changes which are usual and ordinary at different seasons: *Mayor of Savannah v. Spears*, 66 Ga. 304; *Mayor of Savannah v. Cleary*, 67 Ga. 153. But a city is not liable in damages for its failure to keep a sewer in repair, whereby waste water accumulates and flows into a neighboring cellar, which is not connected by drain with such public sewer: *Barry v. Lowell*, 8 Allen, 127; 85 Am. Dec. 690.

Notice of Defects. — The authorities seem to be generally agreed that a city will not be liable for injuries caused to individuals by an obstruction in a public sewer, not placed there by its officials, nor by authority of the city, until after actual notice of such obstruction, or until, by reason of lapse of time, notice may be presumed: *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *Mayor of Jersey City v. Kiernan*, 50 N. J. L. 246; *Smith v. Mayor etc. of New York*, 66 N. Y. 295; 23 Am. Rep. 53; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158. When, however, the inefficient condition of the sewer arises solely from the negligence of the city, no notice of its condition is necessary to render it liable for resulting damages: *McCarthy v. Syracuse*, 46 N. Y. 194.

Creating Nuisance in Constructing. — When a city, in constructing a sewer, creates a nuisance to private property, it is liable in damages for the resulting injury, or if it suffers the sewer to occasion a nuisance after its construction is completed, the city is likewise liable: *Rowe v. Portsmouth*, 56 N. H.

291; 22 Am. Rep. 464; *Stoddard v. Saratoga Springs*, 127 N. Y. 261; *Mores v. Worcester*, 139 Mass. 389; *Vale Mills v. Nashua*, 63 N. H. 136. A city, in exercising its power to construct a sewer, is subject to the limitation forbidding it to create a nuisance injurious to private property, when such consequence is not the necessary result of the exercise of the power; and an action will lie against a city for a nuisance injurious to private property created by it in constructing sewers, under a general power conferred by its charter, when the injury complained of is peculiar to the property owner by reason of the proximity of the nuisance to his property, and in consequence of which he sustains discomfort and annoyance in the possession of his property and diminution in its value not shared by the community in general: *Edmonson v. Moberly*, 98 Mo. 523. A city authorized to construct a sewer with a public outfall in a public tide-water dock is not authorized to create a nuisance in the dock by allowing the deposits from the sewer to accumulate and remain there in such quantities as to menace the public health, obstruct navigation, and seriously injure the rights of wharf-owners: *Franklin Wharf Co. v. Portland*, 67 Me. 46; 24 Am. Rep. 1. And when a city, in building a sewer, undertakes to discharge its contents in a safe and proper manner into the ocean, or a river at a point beyond the complainant's property, but stopping short thereof in the construction, and there discharging the contents of the sewer in such a manner as to emit noxious gases, to the injury of private property, it is liable in damages therefor, and is not relieved because the injury is partly produced by currents and tides: *Hardy v. Brooklyn*, 90 N. Y. 435; 43 Am. Rep. 182. A city constructing a system of sewers, into which private persons have the right to drain, in such manner that the wash and dirt from the streets are conveyed into a tide-water dock and create an obstruction constituting a private nuisance, is liable to an action therefor: *Brayton v. Fall River*, 113 Mass. 218; 18 Am. Rep. 470. Again, when a city, in constructing a sewer, cuts a culvert across the street, whereby the surface water from adjoining lands is gathered, charged with the filth of sinks, and thrown upon the land of another, producing noxious scents and sickness, and rendering the enjoyment of such land impossible, the city is liable in damages therefor: *Smith v. Atlanta*, 75 Ga. 110. Or where a municipality constructs an open ditch upon a street so near private property as to cause part thereof to fall into the ditch, and so as to deprive the owner of access to his dwelling, and to affect the healthfulness of the property by causing filth to become stagnant adjacent thereto, the city is liable in damages: *Seymour v. Cummins*, 119 Ind. 148. When a city constructs a sewer so that garbage, suds, slops, offal, and filth, from dwelling-houses and woolen-mills by which it runs, are conducted and discharged upon and through private property in the city and near the terminus of the sewer, thus corrupting and polluting the air so as to render the land unfit for sale or for residence, the city is liable to the owner of the land for the damages sustained: *Jacksonville v. Lambert*, 62 Ill. 519. It is a nuisance to maintain a sewer which, when it rains, throws excrement, disagreeable to smell and hurtful to health, upon a private lot near the residence of the owner thereof, and the city is liable for the injury sustained: *Reid v. Atlanta*, 73 Ga. 523. But a city, in the progress of constructing its sewerage, is not responsible for any depreciation in the rental value of property caused by the bad smells of a sewer in course of construction, unless it is kept open an unreasonable length of time: *Arn v. City of Kansas*, 14 Fed. Rep. 236.

Surface Water. — A city is liable for collecting surface water by artificial means, such as sewers and drains, and casting it upon the premises of an-

other in increased and injurious quantities: *Pye v. Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Byrnes v. Cohoes*, 67 N. Y. 204; *Gillison v. Charleston*, 16 W. Va. 282; 37 Am. Rep. 763; *Burton v. Chattanooga*, 7 Lea, 739; *Semple v. Vicksburg*, 62 Miss. 63; 52 Am. Rep. 181; *Stanchfield v. Newton*, 142 Mass. 110; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Smith v. Alexandria*, 33 Gratt. 208; 36 Am. Rep. 788. When a city constructs a sewer in such a manner that an additional flow of surface water is forced upon a lot, the owner thereof may recover such damages from the city as may have been caused by the increased flow: *Arn v. City of Kansas*, 14 Fed. Rep. 236. A municipal corporation, in the construction of a public work, cannot divert the flow of surface water, or gather it in volume and force, and empty it upon private property, without becoming liable therefor. It is the duty of the city to provide by adequate means for passing off the water thus concentrated in volume, so as to avoid doing damage to private property; and if it allows the water to accumulate in large quantities at the mouth of a sewer, and thus overflow private property, the city is liable in damages: *Hitchins v. Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470; *Crawfordsville v. Bond*, 96 Ind. 236. Thus a city for unskillfully constructing a gutter, or negligently suffering it to be out of repair or obstructed, by reason of which surface water floods adjacent lands, is liable to the owner, although the lot is below grade: *Gilluly v. Madison*, 63 Wis. 518; 53 Am. Rep. 299. So a city has no right to confine a small natural stream within a box drain, allow the same to become obstructed, and so turn surface water into it that the stream is swelled beyond its natural capacity, and overflows and injures the land of an adjoining owner: *Noonan v. Albany*, 79 N. Y. 470; 35 Am. Rep. 540. Extraordinary rainfalls, against which the city could not provide by the use of due care, caution, and foresight, if unmixed with negligence on the part of the city, will not create any liability for overflows from sewers or drains caused thereby: *Mayor of Savannah v. Cleary*, 67 Ga. 153; *Denver v. Capelli*, 4 Col. 25; 34 Am. Rep. 63; *Collins v. Philadelphia*, 93 Pa. St. 272; *Diamond Match Co. v. New Haven*, 55 Conn. 510; 3 Am. St. Rep. 70; *Wright v. Wilmington*, 92 N. C. 156. But if the proximate or immediate cause of such overflow is negligence on the part of the city in allowing the sewer to become obstructed, the existence of extraordinary rainfall will not relieve it from liability for damages: *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158; *Mayor of Savannah v. Cleary*, 67 Ga. 153; *McClure v. Red Wing*, 28 Minn. 186. When, by reason of want of ordinary care and prudence on the part of a city, its gutters become defective and out of repair, and this defective condition becomes an active agent, commingled with an extraordinary rainfall, in producing damage to private property by overflow, the city is liable: *Haney v. City of Kansas*, 94 Mo. 334. It seems that a city will not be liable for an overflow of surface water if the property owner could have prevented the injury by the use of ordinary efforts or at moderate expense: *Simpson v. Keokuk*, 34 Iowa, 568.

Right to Abandon. — After a city has constructed a sewer or drain for the purpose of carrying off surface water, it may, in its discretion, wholly abandon or discontinue it, and if the city in so doing does not leave individuals in any worse condition by such abandonment or discontinuance than they would be if such sewer or drain had never been made, the city will not be liable for any injury to an individual, caused by the flow of surface water: *Atchison v. Challiss*, 9 Kan. 603.

Liability for Injury from Open Sewer. — A city is bound to maintain its streets in such condition that they will be reasonably safe for travel, and if

a traveler thereon is injured by falling into an open and unguarded sewer while in the exercise of reasonable care and diligence, the city will be liable in damages for the injury received: *Welsh v. St. Louis*, 73 Mo. 71; *Prentiss v. Boston*, 112 Mass. 43; *Grogan v. Worcester*, 140 Mass. 227; and will not be relieved of liability by the fact that the sewer was left open and unguarded by a contractor engaged in its construction: *Welsh v. St. Louis*, 73 Mo. 71. If a person could have avoided injury caused by an open sewer with the exercise of ordinary care and diligence, the city will not be liable therefor: *Massey v. Columbus*, 75 Ga. 658.

HILL v. COMMONWEALTH.

[88 VIRGINIA, 683.]

WITNESSES IN CRIMINAL CASES — DUTY OF PROSECUTION TO CALL — The prosecution is not bound to call every witness present at the transaction which is the subject of the indictment.

WITNESSES IN CRIMINAL CASES — RULE FOR CALLING. — In criminal trials it is within the discretion of the prosecution to say what witnesses it will call; but if any material witness is not called by it, the defense may call him and compel his attendance, and it is within the discretion of the trial court to call any witness present at the transaction, or whose name is on the indictment, not called by the prosecution, and when so called, the witness may be examined and cross-examined by both sides.

INSTRUCTIONS, WHEN IRRELEVANT, though abstractly right, need not be given.

INDICTMENT for felonious shooting. The defendant became involved in a quarrel on the streets of Warrentonville, and its mayor, one Spilman, commanded the peace. The order not being obeyed, Spilman attempted to arrest the defendant, whereupon he fled, and while running away fired a pistol, the ball striking one Fannie Owens in the arm. The prosecution closed its case without calling Fannie Owens as a witness, and the defense made a motion that the prosecution be compelled to call her, she being present at the time. The court overruled the motion. Defendant excepted, and after conviction and judgment, appealed.

A. D. Payne and R. R. Campbell, for the plaintiff in error.

R. T. Scott, attorney-general, for the state.

LEWIS, P. Objection is made to the refusal of the trial judge to compel the girl, Fannie Owens, to be called as a witness for the commonwealth, on the broad ground that the prosecution is bound to call every witness present at the transaction which is the subject of the indictment.

But we do not concur in this view. Such has not been the practice in Virginia, nor can the rule contended for be maintained upon principle. The name of the girl was not on the indictment as a witness, nor is this a case of homicide. The contention, therefore, goes even further than the rule established in England, where the rulings of the courts in matters of this sort have been very liberal to the accused, owing largely, no doubt, to the fact that not until recently have persons indicted in that country had the unrestricted right to be represented by counsel,—a reason that has never existed with us.

Usually, both in England and in this country, the prosecutor calls all the witnesses on the back or at the foot of the indictment; but there is no positive rule in a case like the present requiring it. Roscoe accurately lays it down as a rule deducible from the English decisions, in cases other than cases of homicide, that although the prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment, yet it is usual to do so, in order to afford the prisoner an opportunity to cross-examine them; and that if the prosecutor will not call them, the judge, in his discretion may. But the prosecutor, he says, ought to have all such witnesses in court, so that they may be called for the defense, if they are wanted for that purpose. If, however, he adds, they are called for the defense, the person calling them makes them his own witnesses: 1 Roscoe's Crim. Ev. 139; citing *Rex v. Simmonds*, 1 Car. & P. 84; *Rex v. Whitbread*, 1 Car. & P. 84, note; *Rex v. Bodle*, 6 Car. & P. 186; *Regina v. Woodhead*, 2 Car. & K. 520; *Regina v. Cassidy*, 1 Fost. & F. 79.

In the subsequent case of *Regina v. Edwards*, 3 Cox C. C. 82, the rule, if not modified, was, in one particular at least, stated more guardedly. In that case, which was an indictment for forgery, Mr. Justice Erle, before whom the case was tried, denied an application on the part of the prisoner's counsel to have all the witnesses on the back of the bill called for the crown, that he might have an opportunity of cross-examining them, saying: "There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but, generally speaking, we ought to be careful not to overrule the discretion of counsel, who are, of course, more fully aware of the facts of the case than we can be."

In cases of homicide, the English rule, as the author above mentioned says, is, that every witness who was present at the

transaction ought to be called for the crown, whether their names are on the back of the indictment or not. The leading case on this point is *Regina v. Holden*, 8 Car. & P. 606. In that case it appeared that the fatal blow was struck in the presence of the wife of the deceased and his daughter. The name of the latter was not on the back of the indictment, and she was taken to the assizes by the other side. The widow was called as a witness for the crown, but the prosecutor announced his intention not to call the daughter, whereupon Patteson, J., observed: "She ought to be called; she was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the real truth of the matter."

The daughter was then called and examined.

A similar rule has been recognized in Michigan. There it is held that in cases of homicide, and in other cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called by the prosecution, unless, possibly, where too numerous: *Hurd v. People*, 25 Mich. 406; *Wellar v. People*, 30 Mich. 16. But it is believed that in no other state in the Union has the rule been carried to this extent.

Wharton, indeed, states the rule in pretty much the same terms. The prosecution, he says, is usually bound to call all the attainable witnesses to the transaction under examination. Nor does he expressly confine the rule to cases of homicide, and he qualifies it only by saying that this is not necessary when it would produce an oppressive accumulation of proof: Wharton's Crim. Ev., 9th ed., sec. 448. He cites, besides the English and Michigan cases, *State v. Smallwood*, 75 N. C. 104; *State v. Magoon*, 50 Vt. 338; and *Winsett v. State*, 57 Ind. 26.

The last-mentioned case, reported in 57 Indiana, is in fact an authority against the author's position, as is *Keller v. State*, 123 Ind. 110; 18 Am. St. Rep. 318. The Vermont case does not touch the question, and the North Carolina case is fully in accord with the earlier case of *State v. Martin*, 2 Ired. 101, to be mentioned presently.

We cannot, therefore, without considerable qualification, approve the rule as laid down by this writer. Indeed, not

only has such a rule of practice never prevailed in Virginia, but the great weight of American authority, and we may add, the better reason, is opposed to it.

The English rule was distinctly repudiated in *State v. Martin*, 2 Ired. 101, in an able opinion by Chief Justice Ruffin, in the course of which he said: "The position that the state is bound to examine all the persons who were present at the perpetration of the fact, or to examine on the trial all witnesses who had been sent to the grand jury, has neither principle or practice in this state to support it. The persons present are not the witnesses of the law like persons who have attested a will. It is in the discretion of the prosecuting officer, as of any private suitor, what witnesses he will call. He examines such as he deems requisite to the execution of the public justice. If others can shed more light on the controversy, or place it in a new point of view, it is competent to the prisoner to call them."

In the *Smallwood* case, *supra*, this doctrine was reaffirmed with emphasis. It was there declared to be settled that the prosecutor is the sole judge of what witnesses he will call. It was added, however, that it does not follow that the jury cannot consider his omission to call witnesses who were present at the transaction, and draw from it any reasonable inference, though this remark, it was said, was not meant to imply that ordinarily any inference adverse to the state may be drawn from such omission.

In *Morrow v. State*, 57 Miss. 836, the question was, whether the state was bound, in a murder case, to call all the witnesses whose names were on the back of the indictment, and it was held that it was not. The court, however, seemed to be of opinion that the judge may, in his discretion, compel the prosecutor to call witnesses present at the transaction not voluntarily called by him, if in attendance, or easily attainable, where the interests of justice require it.

In *Bressler v. People*, 117 Ill. 422, which was a case of larceny, the supreme court of Illinois say: "Under our practice, the people are not compelled to introduce all the witnesses whose names are on the back of the indictment. If they fail to do so, and the defendant introduces a witness whose name is thus indorsed, he becomes his witness."

The same view was taken in *State v. Eaton*, 75 Mo. 586. "We see no reason," said the court in that case, "why the state's attorney, acting under his official oath, and as much

bound, as the representative of the state, to protect the innocent as to bring the guilty to justice, should not be left to his discretion as to what number and character of witnesses he will call for the state, to prove an alleged crime against the accused."

To the same effect is *Eason v. State*, 17 Am. Law Reg., N. S., 315, in the supreme court of Tennessee, in 1873. In that case, the state, having closed its case without calling the only witness present at the homicide in question, the defendant moved that the state be compelled to call him for cross-examination by the defendant, but the motion was overruled, and this ruling was affirmed. The court, after referring to and disapproving *Hurd v. People*, 25 Mich. 406, said it could see no reason why the state should be compelled to make out its case by the introduction of any particular witness, or to call all the witnesses present at the transaction; that if the state fails to call a material witness, the defendant may call him, and thus get the facts before the jury.

The question was also considered in *State v. Cain*, 20 W. Va. 679, and the rule laid down by Chief Justice Ruffin in *State v. Martin*, 2 Ired. 101, fully approved.

The recent case of *Selph v. State*, 22 Fla. 537, although cited by the prisoner's counsel in the present case, is in conformity with these authorities. The court in that case concludes a discussion of the subject in these words: "Our conclusion is, that the counsel prosecuting for the state cannot be compelled to call all the witnesses who were present at the time of the commission of an offense, or all whose names are on the indictment. We do not deny, however," it was added, "the right of the presiding judge, when prompted by sound discretion, to call and examine witnesses of his own accord, when the interests of justice demand it, whether the witnesses be for or against the state, and in such a case to permit counsel on both sides to cross-examine such witnesses."

We have thus reviewed the authorities, not because we entertain any doubt on the subject, but because of the importance of the question as a matter of practice, and because it has not heretofore been passed on by this court.

It is obvious that the rule contended for by the prisoner would, if adopted, lead to very serious results in the administration of justice. If the prosecuting attorney were bound to call all attainable witnesses present at the transaction, he might often be compelled to introduce witnesses unworthy of

credit, and yet not be permitted to impeach them. He might be unwittingly compelled to call confederates of the defendant, and thus, by his own evidence, win an easy victory for the accused at the expense of justice.

We think the true rule is this: that it is for the representative of the commonwealth to say what witnesses he will call, and that this discretion ought not to be interfered with. If there be any material witness not called by the prosecution, the defendant may call him, and he is entitled, under the fundamental law of the state, to process to compel the attendance of witnesses, and to the benefit of counsel. It is, however, in the discretion of the trial judge to call any witness who was present at the transaction, or whose name is on the indictment, not called by the commonwealth, and when so called the witness may be examined or cross-examined by both sides, he not being the witness of either party. But this discretion ought to be very cautiously exercised. Whether in any case a refusal to exercise it would be a reversible error, it is not necessary for the purposes of the present case to decide. All we now decide is, that there was no error in the refusal to compel the attorney for the commonwealth to call Fannie Owens as a witness for the prosecution, and that the exception to this ruling is not well taken.

Nor was there error in refusing to instruct the jury as to the law on the subject of arrests. The instruction offered was not relevant to the case. The charge in the indictment was felonious shooting, not for unlawfully resisting arrest. Hence, what took place between Spilman and the prisoner before the shooting had nothing to do with the issue to be tried; and an irrelevant instruction, though abstractly right, ought not to be given: *Vawter v. Commonwealth*, 87 Va. 245.

There was also a motion for a new trial, which was refused. Not much stress, however, is laid upon this point by counsel, and it is enough to say, in regard to it, that we find nothing in the record to warrant a reversal of the judgment pronounced by the learned judge who presided at the trial, and who saw the witnesses and heard them testify. The rule on this subject is well settled and familiar: *Read v. Commonwealth*, 22 Gratt. 924; *Gravelly v. Commonwealth*, 86 Va. 396.

Judgment affirmed.

IRRELEVANT INSTRUCTIONS. — Charge not applicable to nor supported by any evidence should not be given: *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819; *Mauzy v. State*, 68 Miss. 605; 24 Am. St. Rep. 291. See also note

to *Virginia Midland R'y Co. v. White*, 10 Am. St. Rep. 882; *Frost v. Ainalie Lumber Co.*, 3 Wash. 241; *Lincoln v. Smith*, 28 Neb. 762; *Chicago etc. R'y Co. v. Stewart*, 47 Kan. 704; *Gulf etc. R'y Co. v. Harriett*, 80 Tex. 73; *State v. Wade*, 63 Vt. 80; *State v. Parker*, 106 Mo. 217; *Pool v. State*, 87 Ga. 528; *Beavers v. State*, 54 Ark. 336. On the other hand, where there is any evidence to support an issue presented by a party to an action, he is entitled to have the jury instructed with reference to his theory of the case: *Hancock v. Stout*, 28 Neb. 301.

DUTY OF PROSECUTION TO CALL WITNESSES. — Prosecution is not bound to call witnesses at the request of the accused. If the latter requires their testimony, he must call them himself: *Keller v. State*, 123 Ind. 110; 18 Am. St. Rep. 318. Witnesses may be compelled by state to attend court and give their evidence without compensation: *Bennett v. Krotz*, 37 Kan. 235; 1 Am. St. Rep. 248.

WHITING v. TOWN OF WEST POINT.

[88 VIRGINIA, 906.]

MUNICIPAL CORPORATIONS — POWERS. — A municipal corporation is a mere local agency of the state, having only such powers as are clearly and unmistakably granted by the state, and the powers so granted are strictly construed.

MUNICIPAL CORPORATIONS — POWER TO EXEMPT PROPERTY FROM TAXATION. — A municipal corporation has no inherent power to exempt from taxation any property which, by its charter, it is authorized to tax; and when it possesses the delegated authority to tax all property within its limits, it can exempt none.

MUNICIPAL CORPORATIONS. — POWER TO TAX OR TO EXEMPT FROM TAXATION is sovereign, and can be exercised by a municipality only in the manner delegated by the state.

TAXATION — POWER OF STATE TO GRANT RIGHT OF. — The legislature of a state may, unless restrained by the state constitution, grant away the power of taxation for a consideration, either permanently or for a specified period.

MANDAMUS to compel the town council of West Point to assess for taxation the property of the West Point Terminal Railway and Warehouse Company, after such town council had passed an ordinance attempting to exempt such property from taxation.

H. R. Pollard and Isaac Diggs, for the petitioners.

W. W. Gordon, for the respondents.

LEWIS, P. The real question in the case is, whether a municipal corporation has the inherent power to exempt from taxation any property which, by its charter, it is authorized to tax. The town of West Point, by the fourteenth section of its charter, is authorized to tax "all the real and personal

property" in the town; and by the following section it is made the duty of the town council annually to appoint an assessor, whose duty it is to assess "all personal property and all improvements put upon real estate" in the town since the last preceding assessment. Nothing is said in the charter about making exemptions. Has the corporation, then, the power to make them? We think it clear, both upon principle and authority, that it has not.

A municipal corporation has no element of sovereignty. It is a mere local agency of the state, having no other powers than such as are clearly and unmistakably granted by the law-making power. A doubtful corporate power, it has been said, does not exist; and when any power is granted, and the mode of its exercise is prescribed, that mode must be strictly pursued: *Minturn v. Larue*, 23 How. 435; *Roper v. McWhorter*, 77 Va. 214; *Green v. Ward*, 82 Va. 324; *City of Richmond v. Daniel*, 14 Gratt. 385; 1 Dillon on Municipal Corporations, 4th ed., sec. 91.

Now, the power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government; and as all are protected by the government, so all should contribute to its support. "However absolute the right of any individual may be," says Chief Justice Marshall, "it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature": *Providence Bank v. Billings*, 4 Pet. 514. Nor, strictly speaking, is this power of the legislature transferable; for, as we shall presently see, whenever taxes are imposed, whether by a municipality or the state, it is, in legal contemplation, the act of the state, acting either by her own officers or other agents designated for the purpose.

So, also, is the power to make exemptions sovereign in its nature, and likewise resides in the legislature, unless the constitution otherwise ordains.

It is, therefore, a legal solecism to say that the power of exemption, or any other sovereign power, is inherent in a municipal corporation, which, though invested with certain governmental powers for local purposes, is in no particular sovereign.

An eminent writer, in treating specifically of the right to make exemptions, observes that the general rule on the subject is well settled and familiar. "Pertaining, as it does, to the sovereign power to tax," he says, "the inferior municipal-

ities of a state are not possessed of it, and cannot, therefore, make exemptions, except as expressly authorized by the state," and that "when properly made, they must be determined in the legislative discretion; but even this," he adds, "is not untrammelled": Cooley on Taxation, 200.

Judge Dillon, Desty, and other writers on the subject state the doctrine in the same way, and the adjudged cases to the same effect are numerous.

A leading case, and one which closely resembles the present, is *State v. Hannibal etc. R. R. Co.*, 75 Mo. 209. In that case the city of Hannibal contracted with the railroad company to exempt its property from city taxation for and in consideration of the annual payment by the company of seven hundred dollars. The contract recited that the company denied the right of the city to tax its property, and intended, if such alleged right was exercised, to remove its general office and machine-shops from the city to some other point; and it was this that led to the making of the contract. Several years after the date of the contract, — the company having in the mean time fully complied with it, — the property of the company was assessed for city taxes, and thus the question arose whether the contract was valid; and it was held that it was not.

The court rested its decision upon the ground that the power to make exemptions was not conferred by the city's charter, and that the delegated power to tax was in the nature of a public trust, which could not be surrendered in whole or in part. No argument, it was said, was necessary to show that the same principle which forbids the absolute cession by a municipality of this power likewise forbids that which approximates thereto, — namely, the right to make exemptions. It was said, moreover, that the idea of taxation imports equality of apportionment; that it is this which distinguishes taxation from arbitrary exaction; and that the exemption of the property of one person casts an inequitable burden on others not thus graciously favored.

The same principle was enforced in *Austin v. Austin Gas etc. Co.*, 69 Tex. 180. In that case, the city of Austin contracted with the defendant company to exempt its property from taxation in consideration of its furnishing gas to the city at a reduced rate. The contract, however, was held to be *ultra vires*. "The legislature," said the court, "never having attempted to confer upon the city the power to exempt any

property which it was authorized to tax, the contract relied upon, in so far as it attempted to give the exemption claimed, must be held void."

In *Wilson v. Supervisors*, 47 Cal. 91, an order remitting taxes, though made pursuant to a legislative act, was held void, on the ground that it was repugnant to the constitution of California, which provides that "taxation shall be equal and uniform," and that "all property shall be taxed in proportion to its value."

These authorities, which are only a few of many that might be cited to the same effect, show that the rule requiring all municipal powers to be construed strictly applies especially to a case like the present. And the reason, as already suggested, is this: that the power of taxation, being an attribute of sovereignty, can be exercised only by the sovereign. Hence, when delegated by the legislature to a municipal corporation, the latter is considered, as *pro hac vice*, the agent of the state, acting for the benefit of the municipality. In other words, the municipality, in the eye of the law, is the hand of the state by which the tax is laid and collected. Therefore, the statutory authority must be strictly pursued; for as an agency to sell does not imply an agency to buy, so neither does a delegated power to tax imply a power to exempt. If this were not so, and if a municipal corporation could, at pleasure, exempt the property of one person, it could exempt the property of all, and thus deprive itself of the means of existence, or of accomplishing the objects for which it was created.

This principle, which is the touchstone of the case, is not a new one. It has been recognized not only by this court, but by the supreme court of the United States, and other courts of last resort in this country. Indeed, it lies at the very foundation of the law of municipal corporations. In *Gilman v. City of Sheboygan*, 2 Black, 510, it was clearly stated in these words: "The laying of taxes by the authorities of a county, city, or town, for their support, is as much the exercise of the taxing power as when levied directly by the state for its support. The state acts by the municipal governments, and their acts are as much the act of the state as if the state acted by its own officers."

Nor was it less clearly stated in the opinion of this court, delivered by Judge Joynes, from which there was no dissent, in *Langhorne v. Robinson*, 20 Gratt. 661. In that case there was a statute authorizing the city of Lynchburg to tax all the

property within, and for half a mile round and beyond, its corporate limits, to enable the city to meet certain of its obligations. It was contended that the act, in so far as it authorized the city to tax property beyond its limits, was unconstitutional, as authorizing taxation without representation. But the objection was overruled, on the ground that, in a legal sense, the tax was imposed by the state, and that it was competent for the legislature to delegate the power to collect it to local agents not elected by the people outside of the city, although the taxes when collected were to go into the city treasury.

And in *City of Richmond v. Richmond & D. R. R. Co.*, 21 Gratt. 604, Judge Staples, speaking for the court, after observing that municipal corporations are mere auxiliaries of the state government, established for the more effective administration of the government, and that when they exercise the delegated power of taxation, they act as agencies of the state, and not by virtue of any inherent authority, laid it down, as a corollary from these propositions, that the power to say what species of property shall be the subject of taxation or exemption belongs to the legislature.

The application of these principles is decisive of the present case. They are certainly reasonable, and are conceded to be well settled in the jurisprudence of the country outside of Virginia. But are they not also law in Virginia? In what does a municipal corporation in Virginia differ in its nature from the municipalities of other states? In nothing whatever. At all events, if there be any such difference, it has not been suggested in the argument at the bar, nor can we imagine any. The defendants, however, rely, in support of their views, upon two recent cases in this court, viz.: *Williamson v. Massey*, 33 Gratt. 237, and *Town of Danville v. Shelton*, 76 Va. 325.

The first of these cases, so far from settling anything in regard to the powers of a municipal corporation, in no way relates to the subject. The single question there was, whether it was competent for the legislature to exempt from taxation the bonds of the state issued under the act of March 28, 1879. Judge Anderson filed a written opinion, which was not the opinion of the court, nor does it purport to be, in which he took the ground that the power of the legislature to make exemptions was unrestricted. And he also took occasion to say — though obviously foreign to the case — that municipal corporations have the same power. His idea was, that the exercise of this power by the local authorities is often essen-

tial to the introduction and growth of manufactures and other industrial enterprises, which tend to build up the cities and towns, and to advance the prosperity of the state. But in this opinion Judge Christian alone concurred. Moncure, P., was absent, Judge Staples dissented, and Judge Burks, who concurred in awarding the *mandamus*, did so on the distinct ground, as he stated, that the power to exempt the bonds in question was incidental to the power to contract and to provide means for paying such obligations. He did not consider it necessary, he said, to decide the question as to the general power of the legislature to make exemptions, and declined to express any opinion upon it.

The point was therefore left undecided, as it afterwards was in *City of Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431. But had it been decided, the decision could not affect the power of municipalities, for no such question was before the court.

It is insisted, however, that the question was settled in *Town of Danville v. Shelton*, 76 Va. 325.

The first comment we have to make upon that case is, that although not so stated by the reporter, the fact is, the case was heard by three judges only. Moncure, P., sat in no case reported in that volume, and Judge Staples, as the record shows (Order Book No. 26, p. 324), was "absent" also. Judge Burks concurred in the results merely; and in view of what he had previously said in *Williamson v. Massey*, 33 Gratt. 237, the inference is irresistible that he did so because of some point or points in the case other than that relating to exemptions. But be that as it may, Judge Anderson's opinion was concurred in by Judge Christian only; and it need hardly be said that a case so disposed of is no authority for any other case. It is not "a precedent" under the rule of *stare decisis*: *City of Dubuque v. Illinois Central R. R.*, 39 Iowa, 56, 79.

But aside from this, is the opinion upon the point involved in the present case sound? The question there was as to the validity of an ordinance, passed the same day it was introduced in the council, imposing taxes and exempting the property of a certain building association. The charter of the town provided that no ordinance imposing taxes should be valid unless introduced ten days before its passage. Accordingly, the ordinance was assailed, — 1. Because it was repugnant to this provision of the charter; 2. Because the exemption

was illegal; and 3. Because of the inequality of the tax imposed upon the plaintiffs.

Judge Anderson, after fully discussing the first objection, held it to be well taken, as it undoubtedly was, and that was decisive of the case. The second point he disposed of in few words, saying: "I am of opinion that the council had the power of exemption. This question was thoroughly considered in *Williamson v. Massey*, and I beg to refer to what I said upon it in that case." He also referred to *City of Richmond v. Richmond etc. R. R. Co.*, 21 Gratt. 604, and *Orange etc. R. R. Co. v. Alexandria*, 17 Gratt. 176.

The first-mentioned case has already been commented on. One of the questions in the second was as to the power of the legislature (under the constitution of 1830) to exempt the property of the railroad company from city taxation, as was done in its charter, granted in 1847, and it was held that it had such power. And the case in 17 Grattan turned simply upon the construction of a statute, the question being whether the legislature intended to exempt the property of the railroad company from taxation by the city of Alexandria. No question as to the power of a municipal corporation to make exemptions arose in either case. It is obvious, therefore, that the authorities cited do not support the proposition for which they were cited; so that the opinion of Judge Anderson is without the support of Virginia authority, and is contrary, as is conceded, to the settled law in other states, and it may be added, to public policy and principle as well.

Whether, under the provisions of article 10 of our present constitution, requiring, among other things, that state and municipal taxation shall be equal and uniform, and that all property shall be taxed in proportion to its value, it would be competent for the legislature to authorize municipal corporations to make exemptions like the one in question, is a question upon which we express no opinion, since, confessedly, there is no legislative warrant for the exemption complained of. Undoubtedly, unless forbidden by the fundamental law, the legislature of a state may, for a consideration, grant away the power of taxation, either for a specified period or permanently. Instances of this sort have frequently occurred in granting private charters; and it was, no doubt, to such cases that Judge Staples referred in *City of Richmond v. Richmond etc. R. R. Co.*, 21 Gratt. 604, when he said that the power of the legislature to surrender the power of taxation in specific

cases had been exhaustively discussed by the supreme court of the United States, and that the law on the subject was well-settled: See *Home of the Friendless v. Rouse*, 8 Wall. 430, and cases cited.

But this is beside the present case, for here it is the power, not of the legislature, but of a municipal corporation, that is drawn in question.

We think the petitioners are entitled to the writ. To hold that a municipal corporation in Virginia inherently possesses the important and responsible power contended for by the defendants would be a dangerous doctrine. The circumstances of this very case are at least suggestive of the liability to abuse of such a power in such hands. It appears that of the seven members of the council when the ordinance restoring the exemption in question was passed, four were employees of the Terminal Company. The latter all voted for the ordinance, whilst those not so employed voted against it. The result was to relieve the company of a municipal tax on property assessed at \$710,480.15, thereby to that extent increasing the burdens to be borne by others. And whilst these remarks are not meant as a reflection upon the council or any one else, yet the facts just mentioned ought to serve as a warning against establishing a doctrine in this state that has been wisely rejected elsewhere.

The judgment of the court is to award the writ as prayed for in the petition.

MUNICIPAL CORPORATIONS — POWERS. — Municipal corporations have such powers only as are expressly granted, and such incidental ones as are necessary to make those powers available; and their powers are strictly construed: *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423, and note; *Collins v. Hatch*, 18 Ohio, 523; 51 Am. Dec. 465; *People v. Albany*, 11 Wend. 539; 27 Am. Dec. 95, and note; extended note to *Flourney v. Jeffersonville*, 79 Am. Dec. 475. Municipal corporations are for many purposes but departments of the state, organized for the more convenient administration of certain powers belonging to the state: *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186.

MUNICIPAL CORPORATIONS — POWER TO TAX. — A municipal corporation can levy no taxes, general or special, unless the power to do so is plainly conferred: *Fort Smith Bridge Co. v. Hawkins*, 54 Ark. 509; and such power must be exercised in the manner prescribed: *Trenton v. Coyle*, 107 Mo. 193; *San Diego v. Grannis*, 77 Cal. 511.

TAXES — POWER TO LEVY IN STATE. — The taxing power is an incident of sovereignty, the exercise of which belongs exclusively to the state: *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581, and note; *McKeen v. Northampton County*, 49 Pa. St. 519; 88 Am. Dec. 515. The taxing power of the legisla-

ture is supreme, except where limitations are imposed: *Anderson v. Kerns Draining Co.*, 14 Md. 199; 77 Am. Dec. 63, and note; *Standard etc. Cable Co. v. Attorney-General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394, and note; *Kansas City Grading Co. v. Holden*, 107 Mo. 305; *Fitzpatrick v. Board of Trustees*, 87 Ky. 132.

TAXES — DELEGATION OF TAXING POWER BY LEGISLATURE. — The legislature may create corporate bodies for municipal purposes, with the power to tax: *Hope v. Deadrick*, 8 Humph. 1; 47 Am. Dec. 597, and note. See extended note to *Mayor v. State*, 74 Am. Dec. 590. The legislature may vest the power of taxation in public corporations, and such corporations have no power to impose taxes other than those granted, and its exercise must be within the limits and in the manner conferred; *Hughes v. Ewing*, 93 Cal. 414.

STEARNS v. CITY OF RICHMOND.

[88 VIRGINIA, 992.]

APPEAL — ACCEPTANCE OF STREET — PLEADINGS. — Where, in an action against a city to recover damages caused by a change in the grade of a street, a declaration, drawn on the theory that the street was established when the alleged wrong was done, is conclusive on appeal of the question whether or not the street was accepted by the city within a reasonable time after being dedicated to it.

MUNICIPAL CORPORATIONS — OPENING AND GRADING STREETS — LIABILITY FOR CONSEQUENTIAL DAMAGES. — A municipal corporation, acting within the scope of its powers, and with reasonable care and skill, in opening and grading its streets, is not liable to an adjoining owner, whose land is not taken, for consequential damages, in the absence of any constitutional or statutory provision on the subject.

LATERAL SUPPORT — DAMAGES FOR REMOVAL OF. — Every land-owner is entitled to lateral support for his soil as against the adjoining soil, whether it is owned by the public or a private person, and may recover damages directly resulting from the removal of such support.

LATERAL SUPPORT — REMOVAL OF, IN CONSTRUCTING PUBLIC WORKS — DAMAGES. — When, in the authorized execution of public works, excavations are made, and the soil of a private individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and he is entitled to damages for the injury sustained.

LATERAL SUPPORT — LIABILITY OF MUNICIPAL CORPORATION FOR REMOVING. — When a city, in altering the grade of a street, excavates to the depth of sixty feet, thereby causing adjoining land to cave so as to destroy the walls of brick buildings thereon, twenty feet from the street, there is a direct taking of such adjoining land, and a destruction of its lateral support, for which the city is liable to the owner for the resulting damages.

LATERAL SUPPORT — RIGHT TO, MAY BE ASSERTED AGAINST MUNICIPALITY. — The right of an adjoining private owner to lateral support may be asserted against a municipality making excavations in altering the grade of a street, as well as against a private individual.

APPEAL — PRACTICE — VERDICT. — The appellate court, upon discovering that the trial court erred in setting aside the verdict on the trial, will set aside all proceedings subsequent to the verdict, and enter judgment thereon.

EXCEPTIONS — WAIVER OF. — An exception by plaintiff to the setting aside of a verdict is a waiver of a previous exception to the refusal of the court to give instructions requested by him.

ACTION against the city of Richmond to recover for injury to private property abutting on Twenty-first Street in said city, and caused by the grading of said street. The facts are stated in the opinion.

H. G. Cannon, for the plaintiff in error.

C. V. Meredith, for the defendant in error.

LEWIS, P. The first point made by the appellant is, that Twenty-first Street was not an established street when the injury complained of was done, and therefore that the city was a trespasser *ab initio*. The argument is, that although the street is shown on Byrd's map of the city, made in 1742, when the city was laid off, yet there was no acceptance by the city, within a reasonable time, of the dedication, which was essential to the completeness of the dedication; or if there was, the easement in the public has been lost by long non-user.

A sufficient answer, however, to this position is, that the declaration is framed upon the theory that the street was established when the alleged wrong was committed, and that is decisive of the question so far as the present case is concerned.

The next point is, that assuming the street to have been previously established, the damage complained of was caused by the careless and unskillful manner in which the work was done by the city. There is a charge to that effect in the declaration, but the evidence does not establish it. Indeed, the preponderance of the evidence is to the contrary.

The case, then, turns upon the question whether the damages resulting from the work are what are termed consequential merely. If they are not, then the plaintiff is entitled to recover, but not otherwise.

The general principle is admitted, that a municipal corporation, acting within the scope of its powers, and with reasonable care and skill, in opening and grading its streets, is not liable to the adjoining owner, whose land is not taken, for consequential damages, in the absence of any constitutional or statutory provision on the subject.

This was the point, and the only point, decided in *Kehrer v. Richmond City*, 81 Va. 745, upon which case, and others of that class, the defendant relied in the court below. That was an action for an alleged injury to the plaintiff's lot, caused by elevating the grade of the street upon which the lot fronted. But as the damage consisted merely in elevating the grade of the street, without any encroachment upon or physical invasion of the plaintiff's premises, it was held that the damage was consequential, and the action not maintainable. It was said, however, in the course of the opinion, that if the ground of complaint had been that earth had been thrown from the street on the plaintiff's land, he would have had a good cause of action for that, just as where one's land is overflowed and damaged by the erection of a dam in a river, as in the leading case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, where the damage was held to be a taking of private property, within the meaning of the constitution.

This is on the principle that the owner is entitled to the exclusive possession and unmolested enjoyment of his property, and that the public authorities have no more right to trespass upon it than has a private individual.

In the present case, there is no dispute as to the disastrous effect upon the plaintiff's property of the improvement in question. It has, in fact, been almost totally destroyed. Being left without sufficient lateral support, in consequence of an excavation sixty feet in depth, the soil in large quantities gave away and fell into the street below; the buildings on the lot, erected at a cost of several thousand dollars, were cracked and damaged, and had to be taken down to prevent their falling also; and the earth that fell was actually appropriated and used by the city for the construction of another thoroughfare, called Church Hill Avenue, near by. It appears, moreover, that the building nearest the street was not within twenty feet of the street line.

Can it be doubted, then, that the plaintiff's property has been taken by the public, if the constitution means anything? It would be a strange construction of that instrument to hold that it does not apply to such a case.

It is an ancient principle of the common law that every land-owner has the right to lateral support for his soil in the adjoining land of his neighbor. This, indeed, is a natural right, analogous to the flow of a natural river or of air. It is not an easement, but is incident to the land itself, and is there-

fore property. "It seems," says Rolle, "that a man wh has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into the pit, and for this, if an action were brought, it would lie": 2 Rolle's Abr. 565.

The same principle was recognized in *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, and indeed, has been universally recognized both in England and America. In *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, it was well expressed by Gray, C. J., who said: "Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. . . . In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, an action may be maintained against him, without proof of negligence."

And although this natural right does not extend to buildings increasing the downward and lateral pressure, and therefore, if damage is done to them by digging in the adjoining soil, no action can be maintained therefor, unless negligence be proved, yet it is settled by the recent decisions in England, and it would seem clear upon principle, that when land upon which there are buildings slides or subsides by reason of such digging, and the buildings are in consequence damaged also, and their weight in no way contributed to the result, then the damage done to the buildings may be taken into consideration in estimating the damages. This was decided in the court of exchequer, in *Brown v. Robins*, 4 Hurl. & N. 186, and reaffirmed in *Stroyan v. Knowles*, 6 Hurl. & N. 454.

It is denied, however, that this right of lateral support exists as against the public, — that is, in the soil of a street. But why should n't it? If there be any principle for holding that it does not, we are not aware of it, although there may be some authorities in accordance with the defendant's view.

The case of *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243, has been cited, but that case, in fact, supports the view we have expressed. The points actually decided were: 1. That the natural right of lateral support is confined to the soil merely, and that in Illinois the right to support for buildings cannot be acquired, as against a municipal corporation, by prescription. The court, however, took occasion to repeat what it had previously said in *Nevins v. Peoria*, 41 Ill. 507, 89

Am. Dec. 392, namely, that a city having authority to grade its streets has no more power over them than a private individual has over his land, and that it cannot, under the spacious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages, without being responsible itself. In other words, the principle was recognized, that the rights and liabilities of a city, with respect to the adjoining owner, are to be governed by the law of adjoining proprietors.

This was the principle of the decision in *Dyer v. St. Paul*, 27 Minn. 457, where it was expressly decided that an abutting owner is entitled to the lateral support of the adjoining land in a public street, and that the city is liable for damage to such owner's land, occasioned by removing such lateral support in grading the street.

The same principle was recognized in *Transportation Co. v. Chicago*, 99 U. S. 635, although it was held that the plaintiff was not entitled to recover in that case for the sinking of his soil and the consequent cracking of the walls of his buildings, because the damage was due to the superincumbent weight of the buildings.

It would be a curious doctrine to hold that the authorities of a city cannot go upon one's property without his consent, and remove even so much as a shovelful of earth, without rendering the city responsible for a trespass, and yet that they may, by excavating in the street, bring down his soil and buildings with impunity, no matter what their value may be, provided the work is not done carelessly or negligently. This can hardly be law, for it is neither common sense or natural justice. As was remarked by Mr. Justice Miller in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, the decisions of the courts on the subject of consequential damages have gone to "the uttermost limit of sound judicial construction"; and we are unwilling, in a case like this, as the supreme court was in that case, to say that the public may subject private property to total destruction without making compensation, because, in the narrowest sense of the term, it has not been taken for the public use.

As to the right of the abutting owner to the support of his soil in that of the street, the following extract from a recent work on the law of eminent domain is worthy of reproduction. The author says: "When the public takes land for a

street *in invitum*, why should they be held to have acquired by implication something which they did not ask for? Why should a grant or dedication of land to the public, for a particular use, be held to have vested in the public more than a grant of the same land, for the same use, to an individual, would vest in him? The use of the land for a street does not necessarily require that these rights of support, etc., should be in the public. It is always possible and practicable to improve a street without interfering with such rights. It is vastly more for the public interest that the public should occasionally incur increased expense in making improvements, to avoid interfering with such rights, than that the public should in all cases be compelled to pay for the loss of such rights when a street is established."

And in treating of what constitutes a taking, the same author further says: "If, in the execution of public works under authority of law, excavations are made, and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The right of lateral support is a part of his property in the land, as much so as his right of user, or of exclusion. When he is deprived of it, his property is taken just as much as if his property was invaded": Lewis on Eminent Domain, secs. 100, 151.

Concurring, as we do, in these views, it follows that the damages complained of are not consequential, but direct, and that the plaintiff is entitled to recover in this action. The question, however, arises, What is the proper disposition to make of the case?

At the first trial there was a verdict for the plaintiff for one thousand dollars damages, which, on motion of the defendant, was set aside, to which action of the court the plaintiff excepted, and afterwards, a jury being waived, judgment was given for the defendant. The plaintiff also excepted to this action of the court, and the evidence (not the facts) is certified. In such a case, the act of assembly, approved February 7, 1890, amending section 3484 of the code, requires the appellate court to look first to the proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, then to set aside all the proceedings subsequent to the verdict, and enter judgment thereon: Acts

1889-90, p. 36; Acts 1891-92, p. 962; *Mears v. Dexter*, 86 Va. 828.

There was no objection to the verdict by the plaintiff, on the ground that the damages awarded were too small, or on any other ground. On the contrary, he excepted to the setting aside of the verdict, and that was a waiver of his previous exception, taken during the progress of the trial, to the refusal of the court to give to the jury the instructions offered by him: *Western Union Tel. Co. v. Virginia Paper Co.*, 87 Va. 418.

We must, therefore, in obedience to the statute, set aside all the proceedings subsequent to the verdict, and enter a judgment on that for the plaintiff, i. e., for one thousand dollars, with interest and costs, which, in view of the circumstances, is certainly a very moderate recovery.

Judgment reversed.

ALLEGATIONS IN PLEADINGS. — A party is estopped by the allegations in his own pleading: *Knoop v. Kelsey*, 102 Mo. 291; 22 Am. St. Rep. 777.

MUNICIPAL CORPORATIONS — LIABILITY FOR INJURIES CAUSED BY GRADING STREETS. — City is liable for removing lateral support of land in grading its streets. It has no greater rights or powers over the soil of a street than a private owner has over his land; and if it desires greater powers than are possessed by private owners, it must acquire them by the exercise of eminent domain: *Nichols v. Duluth*, 40 Minn. 389; 12 Am. St. Rep. 748. The liability of municipal corporations for damages arising from changes of grade is discussed in *Davis v. Crawfordville*, 12 Am. St. Rep. 361, and note, and in *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396, and note. The general rule, as given in the last-mentioned note, is, that in the absence of statutory provisions imposing liability upon municipal corporations for such damages, they are not liable for consequential damages, where the work is done without malice, and there is no neglect or want of skill. Where, by the terms of the statute, a city can, by complying with certain formalities, preclude the land-owner whose property is injured from an action, the prescribed formalities must be strictly pursued, or the land-owner will have a good cause of action: *Trustees etc. v. City of Anamosa*, 76 Iowa. 538.

RIGHT OF LAND-OWNER TO LATERAL SUPPORT OF HIS SOIL. — The doctrine of the principal case as to the liability of the person making excavations for damages to buildings on the soil is at variance with that laid down in *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771, where the court declares the rule as follows: "For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." In *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771, the question before the court did not relate to the damage done to buildings, and the point in the principal case was therefore not directly presented. In *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, however, it was decided that plain-

tiff could not recover for injuries to a building which stood two feet from the boundary line, the court declaring that "he built at his peril," and that the only compensation he could claim was for the caving in of the land itself. The note to *Perry v. Worcester*, 66 Am. Dec., cites, at page 438, several cases in which it was held that, when a city acting within the limits of its power, grades the whole width of the street so as to cause the fences or improvements of the adjacent proprietor to fall, it is not liable, and that it is not bound to build a wall or erect supports to protect such property. It seems impossible to reconcile these Massachusetts decisions with that of the principal case, or of those cited therein from the English reports. The authorities are entirely harmonious as to the right of a land-owner to have his soil protected against the effects of an excavation by a neighbor. But when a question arises as to the measure of protection to be extended to the buildings erected on the soil, there is a divergence of views which is only to be explained by a fundamental difference of opinion as to the theoretic principles which should be applied. One doctrine is that of *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, that a land-owner "builds at his peril." If he sees his neighbor beginning to excavate the adjacent soil, he can protect himself by procuring proper supports at his own expense. The possibility of such an outlay is one of the contingencies which the law presumes him to have contemplated when he purchased his property. He can, if he prefers, run the risk of seeing his improvements damaged, but in such a case the law will only recompense him for the injury to the soil itself, and will entirely ignore the improvements, except so far as it may appear that their weight has caused the subsidence, upon proof of which fact he will actually have no redress at all. The other doctrine is, that the responsibility for estimating the consequences of an excavation should be thrown on the person making it. If the land on which the buildings stand caves in, the sole question will be, Would there have been a subsidence if the buildings had not been there? If the answer to this question is in the affirmative, the defendant, being liable for the injury done to the soil itself, is also held liable for all the incidental damage which may result from the fact that valuable improvements happen to have been placed upon the soil. He is presumed to have known that the soil would, in its natural condition, have subsided to a certain distance outside the limits of his own excavation, and if he does not provide against that result, he must take the consequences. He saw the character of the property which might possibly be injured, and it is only reasonable that he should pay the penalty of his acts. Of these opposing doctrines as to the rights and responsibilities of the person excavating, the latter seems to us more consistent with justice. When a building is erected upon a piece of land, why should a neighbor be allowed to act as though there were no such building there? The only answer which the authorities granting him that license can offer is, that the rights of the person injured are measured by his ownership of the mere soil on which his building stands. Such an answer, however, manifestly begs the question, and instead of supplying an equitable foundation for the doctrine, simply states a technical doctrine, which, as the court in the principal case very truly remarks, "is neither common sense nor justice." As a step towards reconciling these conflicting theories, we venture to make the following suggestion: All the authorities are agreed that where there is negligence in making the excavation, the defendant will be liable for damage done to buildings on the land which subsides: See *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, and other cases cited in the note to *Thurston v. Hancock*, 7 Am. Dec. 65. Might not the conduct

of a person who undertakes to make excavations on land adjacent to buildings, without taking measures to guard against the natural subsidence of the soil, be fairly regarded as an instance of that "omission to do something which a reasonable and prudent man would do," which, according to a common definition, constitutes one form of negligence? Such a doctrine, if accepted, would at once clear the subject of inconsistencies, and place the responsibility of the person excavating his land on a simple and intelligible basis.

WADDILL v. SEBREE.

[88 VIRGINIA, 1912.]

AGENCY — UNDISCLOSED PRINCIPAL. — Where one contracts as agent without naming his principal, who is unknown, the contract inures to the benefit of the principal if ratified by him, and both are bound thereby.

AGENCY — UNKNOWN PRINCIPAL — EVIDENCE TO DISCOVER. — When one contracts as agent for an unknown principal, parol evidence is admissible to show who the principal was.

AGENCY — UNDISCLOSED PRINCIPAL, WHEN BOUND. — When a person employs an agent to purchase land for him, and the agent purchases in his own name on terms acquiesced in by such undisclosed principal, including the payment of money to bind the purchase, to be forfeited upon default, the principal is bound, and may be compelled to specifically perform the contract of purchase; nor will the forfeiture of the earnest-money paid release the principal from his obligation to complete the purchase.

H. Carter and A. L. Holladay, for the appellant.

W. W. and B. T. Crump, for the appellee.

LACY, J. The bill in this case was filed by the appellant for the specific performance of a contract in writing for the sale of the land of the plaintiff, situated in Henrico County, near the city of Richmond, made with W. E. Terrell as agent for W. E. Sebree, the said agent professing to be an agent, but withholding the name of his principal, and at one time giving a fictitious and false name. Many devices were resorted to to disguise the real party, in order to get the property as low as possible. It being thought that as W. E. Sebree was a wealthy property owner, holding many lots in a new-made suburban addition to the city of Richmond, that the plaintiff might demand a higher price for his land if he should discover during the negotiation that Sebree was desirous of buying this property, which adjoined his new town. These are not detailed here, as they do not affect the question at interest.

The negotiations went on until a contract was drawn up and signed and sealed between the plaintiff and Terrell, the

price to be twenty-two thousand five hundred dollars, one third in cash and the other two thirds in one and two years' time, with interest from date, secured by trust deed on the property, and ten days were allowed the purchaser to examine the title, and five hundred dollars paid in cash to bind the bargain, and the five hundred dollars to be forfeited if Terrell made default.

The contract was made February 12, 1891. About the 22d of February following, a difficulty was raised, and the title, it was said, was not good, but the defect was never formulated, and is claimed to be unfounded, as Sebree agreed to offer eighteen thousand dollars cash shortly afterwards, on which we have no opinion. Terrell declined to go further with Sebree in his concealments, disclosed his principal to Waddill, and the one third cash under the contract being now due and payment refused by the real debtor, Waddill brought suit against Terrell and Sebree; and Sebree, being a non-resident of the state of Virginia, owning property in the state, an order of publication as to him was asked, but his subsequent appearance in the state gave opportunity to make personal service on him, which was had, and an attachment in equity levied upon his real estate in the county of Henrico. Terrell filed his answer and cross-bill, setting forth the whole transaction as detailed above, and insisted that Sebree should be required to hold him harmless in the premises, as all his acts were as his authorized agent, and every step taken by him had been expressly and distinctly directed by Sebree in person, who was in Richmond, in concealment, a part of the time under a false name registered at Ford's Hotel. Sebree denied none of these things, and they are all doubtless perfectly true, but he appeared and moved to quash the attachment, upon the ground that the contract did not carry his name with the transaction, and that there was no debt due from him which could be the ground for an attachment, and that the provision as to the five-hundred-dollar forfeiture made the contract an option which he could sanction or reject at his pleasure, as he was not bound further than that amount in the contract, and that the said attachment was issued upon false suggestion and without sufficient cause.

The case came on upon the foregoing, and upon the answer of Terrell, treated as an affidavit on the part of the plaintiff; whereupon the court abated the attachment, upon the ground that the contract shows no debt due to the plaintiff by the

defendants, and dismissed the proceedings. The plaintiff, Waddill, appealed to this court from the foregoing decree.

There is no dispute about the facts stated above. The defense is made that Sebree is not named in the contract and not bound by it. The facts being established that Sebree, the principal, authorized Terrell to do for him the acts that he did do; that he directed and procured each and every act in detail as transacted; that he approved and ratified each and every act as done, and after its completion, — makes these acts his own. If he is not bound, Terrell, his agent, is, and by his procurement he not only directed Terrell when and how to act, but after he had acted, promised to protect him in the premises, but refused to bind himself to this end in writing. He is bound by Terrell's acts, directed by him for his own benefit. If Terrell had sought to assume the benefit of these acts advantageously to himself, it would have been in fraud of his principal. For the principal to repudiate his agent's authorized acts, made by him for the benefit of and at the request of the said principal is to operate a gross fraud upon Terrell, the agent.

There has been no disavowal by the principal of these authorized acts of his agent, and he thus makes these acts his own. When one contracts as agent without naming a principal, his acts inure to the benefit of the party, although at the time uncertain and unknown, for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the contract. And where the credit is given solely to the servant, if it be in ignorance of who the principal is, although with knowledge that the servant is acting on behalf of another, and much more if, without such knowledge, the principal, when discovered, is liable. And parol evidence is admissible to show who is the principal, when he is undisclosed by the contract, in order to have the benefit thereof or to be charged therewith; and in such case the principal is bound in addition to the agent, for the agent is bound also by the terms of the contract: *Thompson v. Davenport*, 9 Barn. & C. 78; 1 Parsons on Contracts, pp. 48, 50; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; 1 Minor's Institutes, 211.

As was said by Mr. Justice Johnson in *Mechanics' Bank v. Columbia Bank*, 5 Wheat. 326: "The liability of the principal depends upon the facts, — 1. That the act was done in the exercise, and 2. Within the limits, of the powers delegated. These facts are necessarily inquirable into by a court and

jury, and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act, with or without writing, within the scope of the power or confidence reposed in the agent." See also *Fleckner v. United States Bank*, 8 Wheat. 858; *Le Roy v. Beard*, 8 How. 468; *Baldwin v. Bank of Newbury*, 1 Wall. 241; *Bank of Newbury v. Baldwin*, 1 Cliff. 523.

If the acts done and performed in this case were so done at the special instance and request of the principal, for his benefit, are his acts, then at the levy of this attachment he owed to the plaintiff seven thousand dollars, at the time due and payable, and this debt should be satisfied out of the property of the defendant; which is equally true as to the residue of the purchase-money becoming due and payable. And there is no ground whatever for the idea and decision that the earnest-money paid down changed the character in any degree of the contract; it operated only as a part payment of the purchase-money.

It follows that the decree of the circuit court of Henrico appealed from here is erroneous, and the same must be reversed and annulled.

AGENCY — UNDISCLOSED PRINCIPAL. — Where one is conducting a separate business in his own name but with the property of an undisclosed principal, the latter is bound, and cannot escape liability by some secret limitation on the authority of the former: *Hubbard v. Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585, and note; note to *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 389. Where an agent deals with another without disclosing his agency, he is personally liable, as is also his principal: *Jones v. Johnson*, 86 Ky. 530.

AGENCY — PAROL EVIDENCE TO ESTABLISH UNDISCLOSED PRINCIPAL. — Either agent or principal may sue upon a contract not under seal, made by an agent in his own name for an undisclosed principal; and parol evidence is admissible to show that the principal was the real contracting party: *Deits v. Providence etc. Ins. Co.*, 31 W. Va. 851; 13 Am. St. Rep. 909, and note.

CASES
OF THE
SUPREME COURT
OF
WEST VIRGINIA.

BENSIMER v. FELL.

[35 WEST VIRGINIA, 15.]

JUDGMENTS — LIEN NOT ENLARGED BY SUBSEQUENT USURIOUS AGREEMENT.

— A purchaser of land subject to a judgment lien takes it subject only to the amount of the judgment, and not subject to that amount increased by usury under a subsequent agreement between the judgment debtor and the creditor.

JUDGMENTS — PURCHASE OF LAND SUBJECT TO LIEN OF — RES JUDICATA

— **USURY.** — When, after the purchase of land subject to a judgment lien, another creditor brings suit to convene and enforce liens against the lands of the judgment debtor, but not against the land so purchased, and without making the administrator or heirs of the purchaser formal parties, and a personal decree is rendered in such suit against the original debtor, based on the original judgment for the amount thereof increased by usury under an agreement between such debtor and his judgment creditor subsequent to the rendition of the judgment, and that the lands of the debtor be sold to pay that and the other liens convened, the administrator and heirs of the purchaser, in proceedings under an amended bill to subject the lands purchased to payment of the first judgment debt as fixed by the personal decree, are not estopped from showing the usury and disputing the amount of the debt as fixed by such decree, although they proved a claim in the convention of creditors.

JUDGMENTS — PURCHASE OF LAND SUBJECT TO LIEN OF — WHEN NOT AFFECTED BY SUBSEQUENT PROCEEDINGS.

— One who purchases land subject to a judgment lien is not affected by a subsequent judgment against the same land for an amount in excess of such lien to which he was not a formal party and in which the true amount of the first judgment lien was not litigated, and he may satisfy such lien by the payment of the amount called for by the judgment under which he purchased.

JUDGMENTS — CONCLUSIVENESS OF — DEBTOR AND CREDITOR.

— A judgment for a debt is, as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor and the justness and amount of the debt, and cannot be attacked except for fraud or collusion.

JUDGMENTS — CONCLUSIVENESS OF. — A judgment for a debt is conclusive, not only between the parties, but also as to strangers, to establish the amount and existence of the debt, and strangers can attack it only for fraud or collusion.

JUDGMENTS — PRIVITY — GRANTOR AND GRANTEE. — A grantee of land is not affected by a judgment against his grantor after the conveyance merely because of privity in estate.

JUDGMENTS — LIEN OF — WHO BOUND BY. — A judgment adjudging creditors' liens on the land of a debtor is conclusive as between the lien-holders proving liens, although not formal parties, as to the amount and existence of their debts for the purposes of the liens, and a personal judgment against the debtor for such liens is conclusive, not only between the creditor and debtor, but also between the lien-holders, as to the existence and amount of their respective debts.

JUDGMENTS — LIEN OF PARTIES. — A creditor holding a debt against a judgment debtor constituting a lien on his land, who is not made a formal party to a judgment adjudging creditors' liens on the land of the debtor, and who does not prove his lien in such proceeding, is thereby barred from sharing in the proceeds of the sale under the decree, except in the surplus remaining after the satisfaction of the liens decreed. The debt, as a personal debt against the debtor, is not barred by such proceeding.

JUDGMENTS — LIEN OF — TRUST DEED — PARTIES. — A judgment adjudging creditors' liens on land of a debtor will not bar a holder of a debt by deed of trust, who does not prove his debt, from sharing in the proceeds of the sale under the decree, unless the trustee and *cestui que trust* are made formal parties thereto.

JUDGMENTS — LIEN OF — CONCLUSIVENESS. — A judgment adjudging creditors' liens on the land of a debtor will not bar a lien thereon created by a former owner of the land because of a failure to prove the lien, unless its owner is made a formal party to the proceeding.

TRUST DEED AS EQUITABLE MORTGAGE — PARTIES. — Where a deed conveys land to a trustee to hold for the separate use of a married woman, reserving to her the right to sell and to unite with her husband and her trustee in conveying the land at her election, and she and her husband execute a trust deed to the land, properly acknowledged and recorded, to which the trustee is not a formal party, but which he approves by sealed writing attached thereto, the trust deed, though not sufficient to pass the legal title for want of the trustee as a formal party, is sufficient as an equitable mortgage.

DEEDS. — CERTIFICATE OF ACKNOWLEDGMENT OF A DEED BY A MARRIED WOMAN which does not state in what county it was taken is sufficient if the caption designates a particular state and county. It will be presumed that the act occurred in that county.

DEED — CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMAN to her deed of trust, if otherwise sufficient, is not vitiated by the fact that it certifies that she "signed" instead of "executed" the deed. The word "signed," in this connection, is equivalent to the word "executed," used in the statute.

J. W. Harris, for the appellants.

A. F. Mathews, for the appellee.

BRANNON, J. In 1890, W. G. Bensimer filed his bill in the circuit court of Greenbrier County against John P. Fell, to assert the lien of a judgment in favor of Bensimer against Fell, to convene the lien-holders, and sell Fell's lands for the payment of the liens. The suit was in behalf of Bensimer and all other holders of liens, and a reference having been made to a commissioner in chancery, he reported various liens against Fell's lands, and they were sold. One of the liens reported was based on a judgment of date the 10th of January, 1878, in favor of J. Whitehill against Fell, for \$843, owned by Alexander F. Mathews, and reported in his favor. Mathews claimed that he had entered into an agreement with Fell by which Fell agreed to pay an additional sum in consideration of the forbearance of Mathews to enforce said debt, and that according to that agreement, this debt would amount to \$2,246.65 on November 10, 1886; but the commissioner stated that, though there was no plea of usury by Fell, he thought he must be governed by the judgment, and calculate interest at the lawful rate, and so he reported the debt as of that date at \$1,294.14. Mathews excepted to the report for that cause, and the court sustained his exception, and decreed the debt against Fell at \$2,246.65. The lands sold did not pay off all the debts decreed, and the Mathews debt was in large part unpaid, and an amended bill was then filed to bring into the cause and sell, for such of the unpaid debts as were liens thereon, lands which had been sold by Fell, namely, an undivided half of a tract of 111 acres conveyed to the Crookshanks by Fell, and an undivided half of a tract of 700 acres called the "Sinking Creek Tract," conveyed by Fell to A. S. Skaggs. Skaggs being dead, his heirs were made formal parties by this amended bill. The cause was again referred to a commissioner to report the debts of Fell constituting liens on any lands formerly owned and aliened by Fell, and all lands formerly owned by him on which said debts were liens. The commissioner, under this second reference, reported the said Mathews debt as a lien on the land conveyed by Fell to Skaggs, computing it on the basis of the amount of the judgment of \$843, computing interest on it at six per cent from the date from which it ran under the letter of the judgment, crediting \$266.40 as realized on it from the land sold under the first decree. He made a special statement of this debt, stating its principal as \$2,246.65, as fixed by the decree which had been entered in the cause. Mathews excepted to it. His exception claims that the com-

missioner erred as to interest, and that he should have adopted as the principal of said debt the sum decreed by the above-mentioned decree, \$2,246.65, and given interest from its date, instead of adopting the amount of the original judgment for a principal. The court adopted the theory of this exception, and carried it into decree by subjecting the land conveyed by Fell to Skaggs to the payment of \$2,091.09, the sum due Mathews on that basis. The administrators of Skaggs appeal from this decree.

The appellants say that the amount decreed for the Mathews debt is too large. On the date of the conveyance from the judgment debtor Fell to A. S. Skaggs, there had been rendered and docketed the judgment on which this Mathews debt is based, and of the amount of that judgment, with lawful interest as called for by it, Skaggs had notice; and the mere agreement made between Fell and Mathews, by which Fell agreed that, in consideration of forbearance, there was due on the judgment on November 20, 1886, \$2,246.65, a sum largely in excess of the amount called for by the judgment, whatever might be its effect as between Mathews and Fell, could not operate as against the purchaser, Skaggs, to increase the debt over the amount which the judgment, as docketed, would demand. Of the large excess over the call of the judgment the purchaser had no notice. It surely would not be a part of the judgment as to him. In *Barbour v. Tompkins*, 31 W. Va. 410, it is held that where a bond calls for payment of interest annually, and is secured by deed of trust, and interest notes are given for the interest after it accrued, which bear interest, as between the parties the trust will secure the interest on the new interest notes, but that such interest cannot avail as against subsequent creditors and purchasers. The same principle applies here. This is so whether the excess beyond the legal call of the judgment is based on usury or other consideration. It is a question of want of notice to the purchaser as to such excess at the date of his purchase.

But the appellee Mathews contends that as in the first decree (that of November 20, 1886) his debt was ascertained to be, by reason of such agreement, \$2,246.65, that fixes that amount conclusively as the measure of his demand, not only as against Fell, but as against the land conveyed to Skaggs. The administrators and heirs of Skaggs were not formal parties when that decree was pronounced, and the decree is, on common-law principles, a nullity as to them. There was,

however, an order of reference directing the convention of all the lien-holders; and notice was published to lien-holders under section 7, chapter 139, Code of 1887; and a convention of lien-holders was had; a report of liens was made by the commissioner; and the court acted upon the report, decreed the liens, and fixed their amounts and priorities as to the lands still owned by the judgment debtor Fell, then the only land involved in the suit, and directed their sale; and besides, made a personal decree against Fell in favor of Mathews for an amount based on such agreement between them; and moreover, these administrators of Skaggs had a certain debt reported among the liens against Fell's land.

What, in these circumstances, is the effect of that decree fixing the Mathews debt at a certain amount? Is it a finality and a bar against the administrators of Skaggs, preventing them from asserting that it was not the true amount of that debt, except only for the purposes of the cause as it then stood,—that is, as between the various creditors of Fell as regards the only land then in the cause,—that is, Fell's land? or does it go further in its operation, and act against both the administrators and heirs of Skaggs, and estop them from contesting the amount of the Mathews debt when sought to be enforced against land not belonging to Fell, but which he had conveyed away? Before chapter 126, Acts of 1882, amending and re-enacting chapter 139 of the code, it was common to direct the convention of lien-creditors of a debtor by publication in a suit to subject his land to a judgment, whether brought by one judgment-creditor only, or by one for himself and others; and any creditor filing his claim before a commissioner became an informal party, and bound as effectually by the decrees in the cause as if he had been made a formal party: *Arnold v. Casner*, 22 W. Va. 444; *Bilmyer v. Sherman*, 23 W. Va. 662. But a creditor not appearing could not be so bound.

No doubt the amounts of the debts of the various lienors against their common debtor, as fixed by a decree in case of such a convention of creditors, would be final for all purposes, as between the debtor and such creditors, and conclusive as between the creditors, for the purpose of that cause, as to the land of the debtor sought to be sold; and it would, as between the creditors, not because of the statute, but on general principles of law, being conclusive as between the debtor and his creditors, be conclusive as to the existence and amounts of

the various debts decreed against the debtor by decree binding him, as a personal decree, in other litigation between such creditors, or touching other property than that decreed to sale in the cause in which such decree was made. I take it that the act of 1882, making section 7, chapter 139, as it appears in the edition of 1887 of our code, does not change the law as regards this point, — that is, it does not give the decree any more force than it had before, as between parties proving debts either as between them and their debtor, or as between themselves. It does require that before a sale for a judgment there must be a reference and notice to lien-holders, and it does prescribe the particular notice, and it does give the decree a force as to the creditors not presenting debts which it did not possess before the act of 1882, by barring them from afterwards asserting liens on the land, and thus more effectually protects purchasers under the decree; but it does not otherwise impart any additional effect to the decree. But there is a reason why in this case the administrators of Skaggs are not precluded by that decree from showing that the amount of the Mathews debt as fixed by it is too large, and it is this: that the ground on which that debt reached the amount given by the decree is, that it was for the forbearance of money, — that is, usury, — and that such defense is personal to the debtor, and cannot be made by any other creditor, if the debtor be living, and even the subpurchaser of land bound by a previous usurious lien against a former owner cannot defend his land on the score of usury in such previous lien: *Spengler v. Snapp*, 5 Leigh, 478; *Crenshaw v. Clark*, 5 Leigh, 65; *Lee v. Feamster*, 21 W. Va. 108; 45 Am. Rep. 549; *Barbour v. Tompkins*, 31 W. Va. 410.

Therefore, if the administrators and heirs of Skaggs had attempted to plead usury against this debt before the commissioner on the first reference or in court before the amended bill bringing in the Skaggs land, their plea would have been unavailing; and it is well settled that before a judgment, as such, can be an estoppel, the party must have had right to make defense: 1 Greenl. Ev., sec. 535; Bigelow on Estoppel, 98; Herman on Estoppel, sec. 135; *Munford v. Overseers*, 2 Rand. 318. So I conclude that said decree does not, *proprio vigore*, shut out the representative of Skaggs from showing that the decree does not fix the proper amount legally due for the Mathews debt in defense of their land, simply because the administrators were *quasi* parties, or because of any peculiar

force of the suit as a creditors' suit, under chapter 139 of the code; and I will add that it certainly cannot be conclusive against Skaggs's heirs, — 1. Because they were in no sense parties; and 2. Because, even if conclusive as to his administrators, that would not make it binding on the heirs, as there is no privity between them: *McKay v. McKay's Adm'rs*, 33 W. Va. 724; *Saddler v. Kennedy*, 26 W. Va. 636. Here it is the land of the heirs which is to be affected by the decree.

But outside of the peculiar character of the suit as a creditors' suit, and of the fact of the appearance of the administrators therein to prove a debt, there is the personal decree for the Mathews debt against his debtor, Fell. Treat it as recovered in any form of proceeding to which the administrators were in no sense parties, and the question has occurred to my mind whether, as the decree is conclusive on Fell, the Skaggs heirs, claiming land bound by the judgment under a purchase from the judgment debtor, must accept the amount of the debt as decreed as a finality. Can a person claiming land under a judgment debtor, who is sued to hold the conveyance voluntary or fraudulent in fact, dispute the amount of the debt? There seems to be a great difference of opinion and decision on this question. Those who hold against the conclusiveness of the judgment argue that as the grantee was no party to the suit in which the judgment was rendered, it ought not to bind him conclusively, but only *prima facie*, if at all, as to the fact of indebtedness and its amount, because it is a rule that strangers are not bound by a judgment; while others argue that, being conclusive between the parties, it is conclusive also as to third parties, except that it may be shown to have been obtained by fraud or collusion.

Wait on *Fraudulent Conveyances*, sec. 270, says that when the judgment is conclusive between the parties it is "competent evidence tending to prove the debt, even as to third parties, until something is shown to the contrary by way of impeachment. A third party may, as a general rule, show that the judgment was collusive, and not founded on actual indebtedness or liability. Were the rule otherwise, the greatest injustice would result, since a stranger to the record cannot ordinarily move to vacate the judgment or prosecute a writ of error or appeal."

Bump on *Fraudulent Conveyances*, 576, states the rule to be as follows: "Judgment may be impeached collaterally by proof that the court had no jurisdiction, or that it was obtained

by fraud or collusion, or that it was entered illegally, but not beyond this; and where a judgment in a personal action is not liable to either of these objections, whether rendered by default or confession, or after contestation, it is conclusive evidence to establish both the relation of debtor and creditor between the parties, and the amount of the indebtedness, and cannot be collaterally impeached in another suit where such relation and indebtedness are called in question."

In Bigelow on Estoppel, 142, it is laid down that a judgment in favor of A against B cannot be disputed by C, except on the ground that a fraud against creditors, of whom he is one, or against himself in some other relation, e. g., as surety, has been committed, nor can the amount of the judgment be contradicted. Third parties cannot object when those who have exclusive right to settle a question have done so without fraud.

2 Black on Judgments, sec. 605, states the rule to be, that a "judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and the amount of the indebtedness of the latter." *Prima facie* only, according to Barton's Chancery Practice, 537.

In the opinion in *Chamberlayne v. Temple*, 2 Rand. 895, 14 Am. Dec. 786, it is said that a judgment against donor establishes a debt against donee, unless impeached on the ground of fraud or for any other just ground. The words "any other just ground" are very indefinite in this instance.

In *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756, a case to set aside a fraudulent conveyance, it is held that the judgment against the grantor is *prima facie* evidence against the debtor or mere strangers, unless they can impeach it on the ground of fraud, or by showing that a full defense was not made, and can produce new proof showing that the debt was not due. This leaves the door quite widely open: See 2 Lomax's Digest, 341.

My own conclusion, on an examination of the many cases bearing on the subject, is, that a judgment for a debt is, as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor and the justness and amount of the debt, and cannot be attacked, except for fraud or collusion; and also that such judgment is evidence to the same extent against those claiming property that may be affected by the judgment derived from the judgment

debtor, for the reason that parties claiming property under the judgment debtor are his privies in estate, since they claim under him the property affected by the judgment; and it is a cardinal rule, applicable to judgments, that they bind parties and privies, whether in blood, law, or estate. This rule is modified by our own statutes requiring docketing of judgments, etc. But it is a rule, that to bind a man as privy in estate, he must have acquired his interest after the judgment, not before. A grantee of land is not affected by a judgment against the grantor after the conveyance: 2 Black on Judgments, sec. 549; Freeman on Judgments, sec. 162; Bigelow on Estoppel, 135; 1 Greenl. Ev., sec. 536; *Kitty v. Fitzhugh*, 4 Rand. 600.

The conveyance of the Sinking Creek land by Fell to Skaggs was before Mathews's decree. Thus far I find no reason to charge the land conveyed by Fell to Skaggs with the amount of the Mathews debt, as fixed by the said decree. But Mathews brings forward another ground on which he would charge it with that amount. The facts pertinent to this point are as follows: This moiety of the Sinking Creek land which Mathews seeks to subject to his debt was conveyed, on the 27th of September, 1878, by Fell to Skaggs, for the consideration of five thousand dollars, the agreement between them touching the purchase-money providing that of said five thousand dollars "the sum of three thousand dollars is to be paid in cash, but the other two thousand dollars only as follows, as there are now certain judgments binding said land, and said Fell cannot make title thereto free from encumbrances, that is to say, in manner and form as follows: After the said Fell shall have satisfied all of said judgments, viz., by said A. S. Skaggs entering satisfaction of a certain debt, now amounting to \$1,950, due from said Fell to said Skaggs, and secured by trust deed upon what is known as the 'Creigh property,' near the town of Frankford, and by paying to said Fell \$50 in money, with interest thereon from this date until paid. But it is expressly provided that no part of said two thousand dollars shall be paid as aforesaid, nor shall the same be considered as due, until the whole of the judgments on the land first above mentioned shall have been satisfied by said Fell as aforesaid." Fell receipted for \$3,050 of the purchase-money under the agreement. Of that money, \$2,700 was paid to Fell with the understanding that it should be paid on said judgments, and he did pay \$2,575 of it thereon.

The remaining \$350 never went to Fell's hands, but, by agreement, Skaggs was to pay it and did pay it on said judgments. The facts agreed show that said Fell agreed to discharge all such judgments, as also do said agreements show that fact. On September 28, 1875, Lewis S. Creigh, and Elizabeth, his wife, made a paper purporting to be a deed of trust on the tract of 350 acres of land called the "Creigh tract," to secure to said A. S. Skaggs a bond for \$1,500, with interest from September 28, 1875, given by Creigh and wife. This land was sold January 15, 1878, by James Withrow, trustee for Mrs. Creigh, and Mrs. Creigh and her husband to said J. P. Fell, for the consideration of \$5,000; and as a part of such consideration, Fell assumed the payment of the debt due from said Creigh and wife to said Skaggs, amounting then to \$1,844.58, secured by said deed of trust, and this contract retained a lien for purchase-money. This tract was afterwards decreed to be sold as the property of Fell by the decree already spoken of as having been rendered on November 20, 1886, and was sold and purchased by said Mathews.

Now, Mathews contends that, under the terms of the sale by Fell to Skaggs of the Sinking Creek land, Skaggs has in his hands \$1,950, bearing interest from September 27, 1878, retained by him to pay judgments against that land, and to indemnify him against such judgments, which is ample to pay his debt, according to the amount fixed by the decree, and that this is Fell's money; and as his decree is conclusive on Fell as to the amount of the debt, and as he does not plead usury, it does not lie in the mouth of Skaggs's representatives to plead it, and thus cut down the debt to the amount called for by the original judgment; and that to do so would not be for the protection of Skaggs's estate, but for Fell's protection against usury, and he has asked no protection.

Now, if we assume as true that, as between Fell and Skaggs, the contract allowing Skaggs to pay judgments would not be confined to the amount binding the land at the date of their contract, but that Skaggs would be justifiable in paying the debt in question as its amount was enlarged by said subsequent decree, yet that does not reach the length of the question as made by the facts. If we could say that Fell would get any balance of the fund in Skaggs's hands left after cutting down the debt to the proportions of the original judgment, we might agree to the proposition of the appellee Mathews. If Skaggs had no interest in such balance, we might entertain

this proposition. But it is the fact that the argument of the appellee treats this balance as if it were Fell's property, and as if Skaggs had no interest in it, which is the fault of that argument. If Skaggs, under his agreement of purchase from Fell, has the right to apply on the debt due him from Creigh any balance after satisfying judgments, he may insist that the amount of those judgments shall be as called for by them, as existing at the date of his purchase.

Then has Skaggs (or rather, have his representatives) a right to apply such balance to their debt? Fell, as part of the consideration for the 350-acre Creigh tract, had assumed to pay to Skaggs the debt due him from Creigh, and thus became personally bound for it; and afterwards he sold to Skaggs the Sinking Creek land, leaving in Skaggs's hands \$1,950 to go on this debt if not required, or so far as not required, to pay judgments on said Sinking Creek land. Such is the plain meaning of the contract. Had Fell paid such judgments, clearly he could not have demanded the \$1,950; but Skaggs could have applied it on the Creigh debt. Skaggs had right against Fell to apply such balance on his debt due from Creigh, and to pay off the judgment of J. Whitehill assigned to Mathews at an amount fixed by its principal, \$843, with interest at the rate of six per cent per annum from the twenty-ninth day of December, 1877, and the costs of such judgment, and his administrators, or the land purchased by him of Fell and descending to his heirs, could not be charged with more.

It is urged here that said Creigh deed of trust itself creates no lien, because of the inefficacy of the deed of trust to create a lien, for the reason that the land was vested in Withrow, trustee, for Mrs. Creigh, and Withrow is not a party to the deed of trust; whereas the conveyance to him as trustee provided that he must unite in any deed conveying it; and also because Mrs. Creigh did not properly acknowledge the deed. If even this be so, yet the fact remains that Fell received a valuable consideration in the conveyance to him of the 350 acres from Creigh and wife for assuming, and he did assume, the payment of this debt. Mrs. Creigh, out of the purchase-money, devoted enough to pay this debt; and Fell could not himself be permitted to say, after thus being paid for paying this Creigh debt, that the deed of trust making it a lien was not effective to create a lien, disregarding the fact that both the bond and deed of trust create a personal debt as to Mrs.

Creigh, and she; in thus devoting the proceeds of her land to it, still recognized it as a just debt. Though Skaggs was not a party to the contract between Fell and Creigh, yet he could sue Fell for his debt on his *assumpsit* of it, under the code of 1887, c. 71, sec. 2: See Browne on Statute of Frauds, 259, note 1, sec. 166; *Hooper v. Hooper*, 32 W. Va. 535; opinion, p. 670, in *Johnson v. McClung*, 26 W. Va. 659; Wharton on Contracts, sec. 785.

Let us now inquire whether the instrument made by Creigh and wife for a deed of trust is effectual to create a lien. The first reason assigned against its having such effect is, that the deed from Allen S. Livesay and wife to James Withrow, trustee, conveys the land to Withrow to be held for the sole and separate use of Elizabeth A. Creigh, "expressly reserving, however, to the said Elizabeth A. Creigh the right to sell and unite with her husband and her said trustee in conveying all or any part of said lands, whenever she may elect to so do"; and said deed of trust was made between Lewis S. Creigh and Elizabeth A. Creigh, his wife, of the first part, J. P. Fell of the second, and A. S. Skaggs of the third part; and Withrow is not a party to the deed, though at the foot of the deed, below the signatures, is a sealed writing signed by Withrow, trustee, of the same date with the deed, agreeing that the trust might be executed, and in the event that a sale of the lands named in it should have to be made, he would unite in the deed. Plainly, the grantors Livesay intended the land for the absolute benefit of Mrs. Creigh, and to give her power to sell whenever she might elect to do so. The language of the deed does not plainly require her husband and trustee to unite to sell it. The grantors' purpose plainly was to confer a separate estate upon Mrs. Creigh, and invest her with full power of alienation, vesting only the dry legal title in the trustee, to be subservient to the will of the *cestui qui trust*, Mrs. Creigh.

It does seem to me that a valid deed made by Mrs. Creigh and her husband would, without the trustee's being a party to it, transfer a good equitable title, and operate as an imperative direction to the trustee to hold the estate to the use of the purchaser, and to convey it to such purchaser, according to principles stated in *Averett v. Lipscombe*, 76 Va. 404; and that a court of equity would compel the trustee to convey the legal estate to the purchaser: Hill on Trustees, 278. Here is an instrument signed by husband and wife, purporting to

convey land to secure a debt, and approved by the trustee. All the concurrence by trustee and husband contemplated by the deed from Livesay is thus evinced, only that the trustee is not made a formal party so as to pass the legal title. But the intent of all parties is shown, and that intent fully meets the real design of the deed from Livesay. If such an instrument have a legal certificate of the privy examination and acknowledgment of the married woman, and be recorded, why should it not be an equitable mortgage, under the doctrine of courts of equity that any writing used for the purpose of binding property as security for a debt, though informal, and insufficient as a common-law instrument, but showing that the parties intended it to operate as a mortgage or deed of trust, will be an equitable mortgage? *Wayt v. Carwithen*, 21 W. Va. 516; *Fidelity etc. Co. v. Shenandoah etc. R. R. Co.*, 33 W. Va. 761; *Atkinson v. Miller*, 34 W. Va. 115. Any instrument made by a married woman must, to bind the *corpus* of her real estate, be acknowledged duly, and be recorded, before it can be at all operative, because otherwise it is void, unless the conveyance conferring the separate estate confers a mere power of appointment on her, and dispenses with privy examination, which I think the said deed from Livesay does not do. Withrow did not acknowledge this instrument, but that is unimportant. He was only a dry trustee with no substantial estate beyond the legal title subject to the trust.

But it is said that the certificate of the privy examination and acknowledgment of Mrs. Creigh is faulty, because it certifies that she appeared before the justice without saying that she appeared in a particular county, and certifies that she declared that she had willingly "signed" the deed, whereas it should have said "willingly executed." As to the first point, the certificate has the caption, "State of West Virginia, Greenbrier County, to wit." It will be presumed that the act occurred in that county, and that the officer did not do an illegal act by taking an acknowledgment out of his county: *Carpenter v. Dexter*, 8 Wall. 513; *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33; and see copious note touching acknowledgments of deed, *Livingston v. Kettelle*, 41 Am. Dec. 168.

As to the second point, all the decisions say that a substantial compliance with the statute is sufficient. A deed, to be valid, must be signed, sealed, and delivered, to pass legal title; but a contract signed and delivered, though not sealed,

even by a married woman, is effective as an executory contract, when duly acknowledged. The word "executed" would import all that is necessary to consummate a deed, but it does not in this question necessarily import delivery, for it often is acknowledged before delivery. This certificate says that the woman "came before me, and having been examined by me privily and apart from her said husband, and having had the deed aforesaid fully explained to her, she, the said Elizabeth A. Creigh, acknowledged the same to be her act and deed, and declared that she had willingly signed the same, and does not wish to retract it." Who can say that there is any question as to her intent to declare the instrument a completed act? The word "signed" is here tantamount to "executed." In *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, a certificate that the woman declared that she had willingly "acknowledged" the instrument, instead of saying she had willingly "executed" it, was held good. The words "signed and sealed," or "signed" only, have been held equivalent to the word "executed" in certificates of acknowledgment of deeds: *Stuart v. Dutton*, 39 Ill. 91; *Jacoway v. Gault*, 20 Ark. 190; 73 Am. Dec. 494. See note to *Livingston v. Kettelle*, 41 Am. Dec. 178. Taking the whole certificate as to her acknowledgment, as we do in construing other instruments, and ought, as to these certificates, to do, as stated in the West Virginia case just cited, we see that she acknowledged the paper to be her act and deed, thus importing a complete act; and that she had willingly signed the same, thus indicating that the instrument in its then condition, having her signature and seal, was the act of her free will; and that she wished not to retract it, thus indicating that she still adhered to it as her act and deed; and we find it in the hands of the creditor, showing that it must have been delivered. It would be exceedingly technical to defeat the manifest intent of parties because the word "signed" is used instead of "executed." Here there is nothing left out intended to speak the meaning designed by the statute; only one word is substituted for the other; but in the common sense, as used here, it was designed to mean the same thing.

We hold, therefore, that said instrument created a valid lien on the land named in it for the debt named in it, so as to give Skaggs's right to apply on that debt any part of the \$1,950 in his hands after discharging judgment liens on it. It, as also the bond secured by it, created a debt, and that

would give Skaggs the right, as against Fell, to apply on it such balance.

But it is said that Skaggs's estate is barred of the benefit of this debt by force of the report of Commissioner Withrow, and the decree of November 20, 1886, confirming it, because there was an order to convene all persons holding liens on the land of Fell, including the Creigh tract of 350 acres, on which the deed of trust rested, and Skaggs's administrators failed to prove it as a lien against that land, and especially, as the commissioner in his report remarked, "it is presumed that the debt due from L. S. and Mrs. E. A. Creigh to A. S. Skaggs has been paid," and there was no exception to the report, and as said administrators did prove another debt due their decedent from Fell, the judgment debtor against whose land the proceeding was. It is claimed that section 7, chapter 139, code of 1887, has the effect to preclude Skaggs's representatives from claiming this debt. Does this statute, even as to the land of the judgment debtor proceeded against, estop and conclude, for failure to present them, not only liens created by the judgment debtor proceeded against, but also all other liens created on such land by former owners, no matter how far back in the chain of the title? Must the creditor watch every alienation his debtor and his vendees may make, follow up the land through years, and take notice of a suit against its latest owner, though a stranger to him? I do not think so. They may come in, to be sure; but if they do not, they are not barred, unless made formal parties. If, in such case, it be said that the purchaser would suffer from them afterwards, the reply is, they must be sought out and made parties under the common rules of chancery practice. If we treat the said deed of trust as valid, the trustee and *cestui que trust*'s administrators were necessary parties, under *McCoy v. Allen*, 16 W. Va. 732, and *Bilmyer v. Sherman*, 23 W. Va. 656; in the former case the opinion saying: "Only the undefined class of judgment creditors holding liens similar to the plaintiff can be made, in such case, *quasi* parties. If the trustee holding the legal title to the land and his *cestui que trust* are not made formally defendants, they cannot, by any such decree, be made *quasi* parties, and cannot be bound by any decree of the court."

Those cases were before the act of 1882 as to suits to enforce judgment liens, and as the language of section 7 under that act is, "liens by judgment or otherwise," and in the form of

notice, "all claims held . . . which are liens on his real estate," any lien in any manner arising is contemplated; but in cases where the legal title is outstanding in a trustee, it is still necessary to make the trustee, and I should say also the beneficiary under the deed, formal parties.

Again, the statute bars those not presenting their claims only from participation in the proceeds of the sale of the land, not from the personal debt, unless that be expressly involved in the case, in the pleadings, or made so by contestation before the commissioner.

Certainly, therefore, the personal obligation of Fell under his *assumpsit* of the Creigh debt, and under his stipulation to remove judgments from the Sinking Creek land, so as to let the fund go to the Creigh debt, could not be wiped out by the failure to prove the debt before the commissioner. As against Fell under this personal *assumpsit*, it was no lien, and therefore, as such personal debt, it need not have been proven, as the statute says that there may be proven "any claim he may have against the judgment debtor which is a lien on such real estate," and in the notice it says, "to present all claims held by you, and each of you, against the said A B which are liens on his real estate." And the statute plainly does not intend to bar the personal demand of a creditor against his debtor for failure to prove his lien, but only to deny him participation in the proceeds of the land sold, so far as other creditors of said judgment debtor holding liens on his real estate, who have not so failed, are concerned, and so far as the creditors at large of said judgment debtor are concerned. And if this debt be viewed as a lien under said deed of trust, it is not a debt of Fell, — a lien created by him, — but one created by a former owner of the land, and I do not think there was compulsion under the statute to prove it; for the language above quoted as to the debts provable uses the words "any claim he may have against the judgment debtor," and in the notice, the language, "against the said A B" (the judgment debtor).

Where persons are made parties to a suit under this statute, the effect of proceedings in it may be broadened by the allegations touching them in the pleadings, and would be dependent thereon; but where they are not formal parties, I regard the proceeding as in the nature of an *in rem* proceeding, operative in the particular cause as to the particular property disposed of by the decree. Any proceeding trenching upon

that important principle of law, that before a person can be bound by a judicial proceeding he shall be made a party, and served with process, and informed by pleadings of the matters that may prejudice him, are dangerous, and we should not give this statute a scope by construction towards that result not demanded plainly by it. I conclude that the proceedings in this cause prior to the amended bill, making the personal and real representatives of Skaggs formal parties, do not prevent them from having the benefit of their Creigh debt. The case made by the amended bill is to be treated, as to these matters and parties, as if it were another suit. The fact that Skaggs's administrators proved before the commissioner a debt against Fell, which they were bound to prove, does not preclude their claim to the Creigh debt, which they were not bound to prove.

For these reasons, I am of opinion that the \$1,950 in Skaggs's hands is not to be regarded as Fell's money, and as if Skaggs had no interest therein; but that any balance of it, after paying judgments binding the Sinking Creek land, Skaggs has right to apply on the Creigh debt due Skaggs, under the terms of his purchase long before the decree for the Mathews debt; and that Mathews has right to hold the land conveyed by Fell to Skaggs liable, not for the amount as fixed by the decree, but for the amount of the judgment of J. Whitehill against J. P. Fell, \$843, with interest from the twenty-ninth day of December, 1877, and three dollars costs, subject to be credited with the amount applicable thereon from the sale under decree in the case, \$286.01, as of the 5th of September, 1888, without prejudice to the right, if any, of Skaggs's administrator under said deed of trust from Creigh and wife to J. P. Fell, trustee, dated the 28th of September, 1885, to secure the debt therein specified to A. S. Skaggs against the land therein described.

The appellants ask this court to dismiss the amended bill, and refuse relief to Mathews, because, while he has the right to subject said Sinking Creek land to his judgment, yet he became the purchaser of the tract of land on which said deed of trust rests, and that it is of more value than his judgment, and is bound for said trust. This cannot be done in this case. The debt of Mathews is only a charge on the Sinking Creek land, not a personal debt on Skaggs; while Skaggs's debt under the deed of trust, if a charge on the 350 acres, is no personal debt against Mathews. We do not consider that

we have before us the question of the liability of the 350 acres, and therefore do not pass on it, but leave it without prejudice to the rights of Skaggs's estate from this decision. But the decree is erroneous, also, because it directed the half of the land conveyed by Fell to Skaggs to be sold, whereas it should have sold first the undivided half of the 111 acres conveyed by Fell to Crookshanks, because Fell's conveyance to Crookshanks was later in date. The reason for selling the Skaggs land first given in the decree does not exist; that is, that Skaggs retained a sum of money for and belonging to said Fell. That fund, as shown above, was retained to indemnify Skaggs against judgments, and next for application on his Creigh debt. He retained it for his own benefit, not to protect Crookshanks against the ordinary rule by which land last sold is to be first subjected to judgment liens. It was just as though Skaggs had paid the purchase-money in full in cash.

The decree of June 26, 1890, is reversed, and cause remanded, to be further proceeded with according to principles herein indicated, and in other respects according to principles governing courts of equity.

INTEREST ON JUDGMENTS. — At common law, judgments carried no interest: *Thompson v. Monrow*, 2 Cal. 99; 56 Am. Dec. 318. This has been altered in most, or perhaps all, states. But interest on a judgment of another state will not be allowed, where there is no evidence showing that the common law has been altered by statute: *Thompson v. Monrow*, 2 Cal. 99; 56 Am. Dec. 318; compare *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877.

JUDGMENT LIEN extends to interest as well as principal, where there is a confession of judgment containing an agreement to pay interest: *Sims v. Campbell*, 1 McCord Ch. 53; 16 Am. Dec. 595.

JUDGMENTS, WHO ARE ESTOPPED BY. — Judgment or decree of court having jurisdiction of the subject-matter and of the parties is conclusive and binding on such parties and their privies: *Woods v. Montevallo Coal etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Maloney v. Dewey*, 127 Ill. 395; 11 Am. St. Rep. 131; *Carr v. Hanchel*, 28 S. C. 331. Both litigants must alike be concluded, or the proceedings cannot be set up as conclusive on either: *Nowak v. Knight*, 44 Minn. 241. See also note to *Hill v. Bain*, 2 Am. St. Rep. 877. If all the parties interested have been before the court, none of them can, in another suit, challenge any rights or liabilities fixed by the judgment in the preceding case: *Luhey v. Kortright*, 132 N. Y. 450. And where a suit is prosecuted by one at the instance of another, who is the real party in interest, and for his benefit, the adjudication will be binding and conclusive upon the latter: *Cheney v. Patton*, 134 Ill. 422. A judgment, no matter how erroneous it may be, is binding on the parties until reversed or annulled: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95; *Thomas v. Junction City Irr. Co.*, 80 Tex. 550. But the parties in both suits must be the same, or else in privacy with each other: *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379; *Bode*

v. *New England Investment Co.*, 1 N. D. 122; *Ostrander v. Hart*, 130 N. Y. 406; a privy being one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and who derived those rights from a party thereto: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159. See also note to *Hill v. Bain*, 2 Am. St. Rep. 877, 878. An action against a person in one capacity does not bind him in another: See note to *Stockton Building etc. Ass'n v. Chalmers*, 7 Am. St. Rep. 175. Thus an action against personal representatives does not affect individual rights: *Stockton Building etc. Ass'n v. Chalmers*, 75 Cal. 332; 7 Am. St. Rep. 173. But a judgment is conclusive on the parties and their privies, although in the action in which it is pleaded some only of the parties are litigant: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421.

COLLATERAL ATTACKS ON JUDGMENTS: See note to *Merrill v. Merrill*, 23 Am. St. Rep. 104-119.

JUDGMENT IS NOT CONCLUSIVE as to matters arising after it was rendered: *Dewey v. St. Albans Trust Co.*, 60 Vt. 1; 6 Am. St. Rep. 84; *Ross v. Hawley*, 133 N. Y. 315; nor as to such matters as were not essential to be determined before the judgment could be rendered: *James v. James*, 81 Tex. 373; nor, although a judgment has been entered in a prior action, does it prevent the relitigation of a fact litigated and found in such action, which was wholly irrelevant to the issues therein, and did not enter into and was not involved in the final judgment: *Springer v. Bien*, 128 N. Y. 100.

JUDGMENT DOES NOT ESTOP ONE WHO WAS NOT A PARTY: See note to *Hill v. Bain*, 2 Am. St. Rep. 876. The general rule is, that a judgment in a proceeding does not conclude one not a party thereto: *Short v. Gahway*, 83 Ky. 501; 4 Am. St. Rep. 168; *Boutwell v. Steiner*, 84 Ala. 307; 5 Am. St. Rep. 375.

CONVEYANCES OF MARRIED WOMAN'S LAND. — Where land is conveyed to a trustee for the sole and separate use of a married woman, and the husband subsequently conveys the same by deed executed by him and his wife, in which her name only appears in the attestation clause, and in which no reference is made to the trustee or the trust estate, the deed is that of the husband alone, and does not convey the title vested in the trustee: *King v. Rhew*, 108 N. C. 696; 23 Am. St. Rep. 76.

ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMAN, SUFFICIENCY OF: See notes to *Pickens v. Knisely*, 6 Am. St. Rep. 642, 643, and *Cox v. Holcomb*, 13 Am. St. Rep. 83. A certificate of an officer to a married woman's deed, stating that "she acknowledged the same freely and willingly," is not a substantial compliance with a statute requiring such certificate to state that "she acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same": *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866. The erroneous using of the word "with" instead of "without" in the certificate is immaterial, where it appears that the statute has been complied with as to the privy examination, etc.: *Durat v. Daugherty*, 81 Tex. 650. A certificate of acknowledgment, that before a notary public "personally appeared A B and O D, his wife, acknowledged the execution of the annexed mortgage," shows the acknowledgment of the mortgage by both husband and wife: *Brown v. Corbin*, 121 Ind. 455. The husband need not actually sign a conveyance of his wife's land at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer: *Linsberger v. Tidwell*, 104 N. C. 506.

BROWN OIL COMPANY v. CALDWELL.

[35 WEST VIRGINIA, 35.]

WATERS AND WATERCOURSES. — **RIPARIAN OWNERS** of land bounded by the Ohio River take to low-water mark.

BOUNDARIES — OHIO RIVER AS. — A grantee of land bounded on the Ohio River takes along the line of the river to low-water mark, in the absence of decided language in the conveyance showing a manifest intent to the contrary on the part of the grantor.

BOUNDARIES — RIVER AS. — When a deed of land calls for a stake at the Ohio River, thence down said river to another stake at the mouth of French Creek, the grantee will take along the line of the river to low-water mark, although the deed provides that these calls are controlled by a surveyor's plat fixing the first point as just over the river bank, running thence in a straight line to the stake on the mouth of French Creek, thus leaving a narrow, inaccessible strip between it and low-water mark.

BOUNDARIES, MEASUREMENT OF, ALONG RIVER. — When a certain distance is called for in a deed, from a given point on a navigable stream to another point on the stream, to be ascertained by such measurement, the measurement must be made by the meanders of the stream, and not in a straight line.

BOUNDARIES — PRESUMPTION. — It is not presumed that a party granting land intends to retain a mere narrow strip between the land sold and his boundary line, in the absence of express provision to that effect in the deed, and especially when it would cut off the grantee from valuable water privileges.

J. G. McCluer, and Jackson and Yeaton, for the appellants.

J. A. Hutchinson, T. I. Stealey, and L. N. Tavenner, for the appellee.

BRANNON, J. On a bill presented by the Brown Oil Company against R. G. Caldwell and others to the judge of the circuit court of Pleasants County, an injunction was awarded restraining the defendants from constructing derricks, boring any well, or entering or trespassing upon certain premises of the plaintiff described in the bill; and the judge having overruled a motion to dissolve the injunction, the defendants appealed to this court.

On the 26th of October, 1887, George Hendricks and wife conveyed to Elizabeth Jones three tracts of land, Nos. 1, 2, 3, and on the 27th of March, 1890, Elizabeth Jones and her husband leased said land to Joseph S. Brown, for the development of oil, and he transferred his lease to the Brown Oil Company. On the 14th of July, 1890, George Hendricks leased to R. G. Caldwell and others, for the purpose of boring for oil, a parcel of land of about one acre, and these lessees

having entered to bore a well for oil, the Brown Oil Company obtained said injunction. Both sides claim under George Hendricks. The Brown Oil Company claims that the deed from Hendricks and wife, conveying lot No. 2, goes to low-water mark on the Ohio River, leaving no opening for the subsequent lease made to Caldwell and others; while Caldwell and his co-lessees claim that the prior lease from Hendricks to Brown is next to the river bounded by a line running practically with its bank, not including its shore and beach, leaving between this line and low-water mark an area of about one acre leased to them. Thus the only question we are to decide is, whether the lot No. 2, conveyed by Hendricks and wife to Elizabeth Jones, extends to the low-water mark of the Ohio River; for if it does, there is no room for the land he subsequently leased to Caldwell and others, he having no title to it to confer on Caldwell and others.

The deed from Hendricks to Jones describes lot No. 2 as follows: "Tract No. 2. Beginning at a stake on upper bank of said French Creek in edge of railroad right of way, marked 'G' on diagram; thence with said right of way N., 74° E., 31 poles, to a stake at H; thence N., 8° W., 26 9-10 poles, to a stake at Ohio River marked 'I'; thence down said river S., 62° W., 81 6-10 poles, to a stake on point at mouth of said French Creek; thence S., 28° E., 1 pole to a stake; thence up to the creek, with its meanders, N., 80° E., 20 poles; N., 65° E., 21 7-10 poles; N., 38° E., 12 3-10 poles, to the beginning, — containing six and one half acres by survey.

Hendricks's right extended to low-water mark of the Ohio River, as riparian owners of lands bounded by that river go to low-water mark, subject to the easement of the public in that portion between high and low water marks: *Barre v. Fleming*, 29 W. Va. 314. I think it plain, that under the law the boundary of tract 2, as given above, carries that tract to the limit of Hendricks, that is, to low-water mark. We see that after leaving the Ohio River railroad right of way the call is for N., 8° W., 26.9, to a stake at Ohio River. Where does this line stop? As the grantor's line was the low-water mark, in law is it not reasonable to say that he intended to sell to the outer line when he located a corner at the river? Did he intend still to retain a narrow strip, which he could not reach except by going over the land which he sold? Of what value would it be to him? Is it reasonable that the

purchaser intended to leave this strip, which would cut off all access?

Angell on Watercourses, sec. 23, says: "The cases, on the whole, may be said to demonstrate the existence of the rule that a grantee bounded on a river (and it is immaterial by what mode of expression) goes *ad medium filum aquæ*, unless there be decided language showing a manifest intent to stop at the water's edge; and there seems a distinct and strong tendency in the cases to turn every doubt upon expressions which fix the boundary next the river in favor of a contact with the water."

My examination satisfies me thoroughly that this statement of Angell is a fair and unquestionable presentation of the law. Surely, under this law, a line calling for a stake "at Ohio River" would carry us to the water of the river. In the case of the Ohio, it is to low water; in case of streams not navigable, it would be to the middle of the stream.

In *Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472, a call for a stake at the river made the river the boundary, and from "stake at the river" the line was said to be "on the river," and it was said to be a strong argument to show that the river was the boundary: Note to section 29, Angell on Watercourses. Where a line ran to a stake standing on the east bank, etc., thence down the river, it extended to the thread of the river. A line calling easterly on a creek, and down said creek to a butternut-tree, was held to place the corner in the center of the stream opposite the butternut: 1 Wait's Actions and Defenses, 711.

The cases are numerous to show that this line from the railroad goes clear to the river. Thus we are at the low-water mark, and we cannot leave it. The next call is: "Thence down said river S., 62° W., 81 6-10 poles, to a stake on point at mouth of said French Creek." Who can doubt that this expressly keeps us to the low-water mark in tracing the line? A line running on, or with, or along, a stream goes to its middle; and even where the call is the bank of a river, it is to its middle: Angell on Watercourses, sec. 24. And this river line calls for a terminus at a stake "on point at mouth of said French Creek." The mouth of French Creek is the Ohio; that is, it is actual, physical contact of creek with river; a confluence of their waters; their intermingling and union. This is the meaning of the expression "at the mouth of said French Creek." The call for a stake, all surveyors know, is

not a natural or fixed immovable point, but we must yield distance to the natural call for the river, and be conducted to it by course or some other element to give it location. Here the stake is "on point at mouth of said French Creek." That is the point of land made by the junction of the creek and river. If we want to go to high-water mark, we must go out the point only so far as to reach that mark; while if we want to go to low-water mark, we proceed on out this point until we get to low-water mark. In either case, we are on the point; and as Hendricks's right went to low-water mark, and we are not to assume that he intended the unusual thing of retaining a narrow, inaccessible strip, or that the purchaser intended to leave this strip to exclude him from valuable river privileges, what more plausible than to say that this corner also is at low water, and that thus the river line follows the low-water mark? Authorities in support of these views could be cited almost without number: *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Camden v. Creel*, 4 W. Va. 365. So, tested by the calls of the deed, it is safe to say that the river line of Hendricks's grant to Jones is the low-water mark.

While I do not deem it necessary to advert to all the points of argument made for the defense, yet it is just to their claim that I should refer to a fact on which they rely, — on which, it may be said, their defense alone rests. The deed from Hendricks to Jones, after describing each of the tracts, says: "These said calls are controlled by diagram made by R. A. Gallaher, county surveyor of the county aforesaid"; and it is proven that before the deed was made, Hendricks, Mrs. Jones's husband, acting for her, and Gallaher, the surveyor, made an actual survey of this lot 2, running the line from the railroad right of way towards the river, but not to the river; and that he stopped at 26.9 poles, point I, which is some distance over the edge of the river bank, and some distance from the water, and ran the next line from said point I down to the point at mouth of French Creek, and that said line is straight, and that he made a plat, giving the course and distance according to the running on the ground, and this line left a strip between it and the water of the river. Counsel for appellees concede that but for the reference in the deed to this diagram the deed would go to the water, but contend that the declaration of the deed that its calls shall be controlled by the diagram shows a contrary intent, and that the lines, as shown on the plat as they were actually surveyed

on the ground, and as they are short, and distance can be accurately fixed, must govern.

There is some force in this contention, but it is not sufficient to control the case. We have seen that the calls of the deed in law go to low water, and all presumptions favor the theory that the intent is to go to the water, and it must be clear that such was not the intention.

Angell on Watercourses, sec. 9, states the law thus: "The only mode by which a right of property in a water-course, above tide-water, can be withheld from a person who receives a grant of the land is by reservation directly expressed or clearly implied." Sec. 17: "It matters not what may be the intention of the grantor of land described as being bounded by a watercourse, or by words as comprehensive or in law equivalent; the grantee will hold to the thread of the river, even if such was not the grantor's intention."

Chancellor Kent, in the third volume of his Commentaries, page 428, says: "It would require an express exception in the grant, or some clear and unequivocal declaration or certain and immemorial usage, to limit the title of the owner in such cases to the edge of the river."

In *Watson v. Peters*, 26 Mich. 508, it was decided that a grant of a city lot bounded on a navigable stream, with the water as a boundary, in the absence of an express reservation, conveys to the grantee to the center of the stream; and the fact that the grantor, before conveying, platted the land into lots and blocks, with distinct lines and distances marking the boundaries of each lot, and with the water boundary of the river lots indicated by a line representing the shore line, and conveyed by such plat, will not limit the grant to such shore line, or operate to reserve to him proprietary rights in front of the lots conveyed. Judge Cooley said in the opinion: "The owner of city lots bounded on navigable streams, like the owner of any other land thus bounded, may limit his conveyance within specific limits, if he choose; but where he conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to others for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. Such privileges and conveniences constitute a part, and in many cases the principal part, of the value of the grant. . . . The rule is too valuable and im-

portant to be varied by so immaterial a circumstance as that the boundary on the water is described by a line, instead of by making use of words which to the common understanding would convey the same meaning; and what we have said of navigable waters is equally applicable to all watercourses. If, on the face of the plat by reference to which the defendant bought, there was anything which distinctly indicated an intent on the part of the proprietors to make this case exceptional, and to reserve to themselves any rights in front of the water lots marked on it, after they should have been sold, the case would have been different: Angell on Watercourses, sec. 23, note 2. There seems to be no conflict whatever in the authorities, that where a certain distance is called for from a given point on a navigable stream to another point on the stream, to be ascertained by such measurement, the measurement must be made by the meanders, not in a straight line": Tyler on Boundaries, 224.

Where an exception or reservation which would cut off the grantee from the water is claimed to exist in a deed, the Maine court, in *Winslow v. Patten*, 34 Me. 25, has said that the doctrine pertinent to the matter is, that words of doubtful import are to be construed most favorably to the grantee: See Tyler on Boundaries, 225. If the intention was, in the case of this deed from Hendricks to Jones, to reserve the land claimed by the defendants, how easy it would have been to except it plainly. It is difficult to say just what was meant by the language of the deed that the calls were to be controlled by the diagram. Was it intended to keep it from going to low-water mark, which everybody knew to be Hendricks's line? Why, then, did the deed call for a stake at the river, and run thence "down said river," which certainly would follow the river at low-water mark? Shall we allow this doubtful language to overthrow calls in the deed which in law would carry us to low-water mark, and exclude this one acre, and cut off Mrs. Jones's land from the advantages of the stream? I think not.

What does this language mean with reference to lots 1 and 2? I observe that in describing lot 1 the call is from railroad land N., 8° W., 28.4, to river at A; then down the river 6 poles to I. I take it that the river line of lot 1 goes to low-water mark. It stops at this same letter "I" known in lot 2. How long would the diagram last? If lost, where could this description be found? Shall we reject the certain

calls of the deed for those of the plat, under this clause, uncertain and perishable? It is not presumed that a party granting land intends to retain a mere narrow strip between the land sold and his line, and this is much more so when it would cut off the grantee from valuable water privileges: *Western M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406.

There is evidence tending to show, perhaps a decided preponderance, that when the survey was made, the husband of Mrs. Jones directed the surveyor not to include this piece claimed by defendants, saying he did not desire to pay for land which he could not cultivate, and that he directed where the line down the river should be run, and that the vendor acceded to it, saying he could utilize this small piece in tying up boats and rafts. Hendricks says he did not intend to sell it. Mrs. Jones and her husband say they did intend to include it in their rights, but that the agreement was, that it was worth nothing for cultivation, and the consideration of the purchase being one hundred dollars per acre, she did not wish to pay for it, and the survey was made, not to limit the land from the river, but to ascertain just how much land fit for cultivation there was, so as to count its cost. This version derives considerable support from the fact that the calls in the deed are for the river, while the lines actually run do not go to it. But there stands the deed, the repository of the agreement of the parties, conferring certain legal rights, not to be overthrown by the doubtful meaning arising from the clause of the deed that the calls were to be controlled by the plat, and I do not think we can allow any verbal agreement such as that referred to to control the effect of the deed.

Order of circuit court overruling motion to dissolve is affirmed, and the injunction is perpetuated.

WATERS AS BOUNDARY LINES: See monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56; note to *Livingston v. St. Olair County*, 16 Am. Rep. 524; extended note to *Arnold v. Mundy*, 10 Am. Dec. 335.

HULL v. HULL.

[85 WEST VIRGINIA, 155.]

JUDICIAL SALES — RIGHT OF PURCHASER TO SUBROGATION. — A purchaser of land sold under a void decree is entitled, upon the disaffirmance of the sale, to be subrogated to the rights of the creditor whose valid debt his money has gone to pay, and to charge the land by creditors' bill with the amount of such debt.

JUDGMENTS — WANT OF JURISDICTION — DEFECTIVE AFFIDAVIT FOR ORDER OF PUBLICATION. — A judgment or decree authorizing the sale of a decedent's lands to pay his debts is erroneous, where it appears upon its face that the affidavit on which rested the order of publication against his heirs as non-residents was defective and insufficient.

JUDICIAL SALES — DEFECTIVE DECREE. — A judgment or decree authorizing the sale of a decedent's lands to pay his debts, but not declaring upon its face what particular debts are to be paid, or fixing their order or priority, is erroneous, and will not support a sale made thereunder.

EVIDENCE — VOID JUDGMENT IN ANOTHER STATE. — A judgment or decree rendered in one state, authorizing the sale of a decedent's lands there to pay his debts, but which is void as to his heirs, is not admissible against them in a suit in another state to subject the lands of the decedent situated there to the payment of the same debts.

EVIDENCE — RECORD OF JUDGMENT OF ANOTHER STATE AGAINST HEIRS. — A record of a judgment against heirs in one state, authorizing the sale of a decedent's lands situated there for the payment of his debts, is not admissible as against such heirs in an action in another state to subject the lands of the decedent situated therein to the payment of the same debts, either for the purpose of establishing them or fixing their amount.

VENDOR AND VENDEE — LIEN FOR PURCHASE-MONEY. — When a purchase-money bond is secured by a lien retained in the deed of the land, the execution of a new bond will not release the lien.

STATUTE OF LIMITATIONS — JUDGMENT, WHEN WILL NOT STOP RUNNING OF. — A judgment or decree against heirs in a suit in one state, authorizing the sale of a decedent's land situated there to pay his debts, will not prevent the running of the statute of limitations against a suit in another state to subject his land situated therein to the payment of the same debts.

DEEDS — GENERAL WARRANTY — EFFECT OF. — When a deed conveys all the grantor's right, title, and interest in the land, and contains, in general terms, a covenant of general warranty, the covenant is restricted and limited to the interest conveyed, and does not warrant the title to all the land described in the deed.

DEEDS — COVENANT OF GENERAL WARRANTY — EFFECT OF. — A covenant of general warranty in a deed is intended to defend only the estate conveyed, and cannot enlarge that estate.

STATUTE OF LIMITATIONS — LIEN FOR PURCHASE-MONEY. — The statute of limitations does not run against a lien for purchase-money of land reserved in a deed.

JUDICIAL SALES — RIGHTS OF PURCHASER — DOWER. — A purchaser of an estate at a void judicial sale, who, upon its disaffirmance, is entitled to subrogation to the rights of a creditor whose debt his money has paid, cannot charge the dower right of the widow with one third of the rents and profits of the estate purchased, when no dower therein has been actually assigned.

R. S. Turk, for the appellant.

R. S. Parsons, for the appellees.

BRANNON, J. This case, if we may call it the same case, is now the second time before this court. The report of the former decision of this court will be found in 26 W. Va. 1, where may be found a full statement of the facts up to the date of the former appeal. A chancery suit had been brought in the circuit court of Pocahontas County by Sheffy, administrator under a Virginia appointment of F. H. Hull, deceased, and Elizabeth Hull, his widow, to sell lands of said decedent lying in Pocahontas County, to pay debts of his estate, some of them alleged to exist as purchase-money liens on said land, and to satisfy the dower claim of said widow out of the proceeds of sale in lieu of dower in kind. A decree of sale was rendered, and said lands sold, and the sales confirmed; and then one of the heirs, after becoming of age, filed a petition showing cause against the decrees, and asking their reversal, and the restoration of his share in the lands sold under the decree; and such relief having been denied him, he appealed to this court, which rendered a decision holding that the plaintiffs in the suit could not maintain such a bill to sell said lands, and that the infant heirs of Hull were not parties before the court and therefore the decrees and sales were void, and remanding the cause to the circuit court, "with instructions to put all parties *in statu quo*, by requiring all persons who have received any of the purchase-money of said lands to refund the same with interest, and by refunding to the purchasers any money which they may have paid on their purchases, with interest from the time when it was paid, and allowing them compensation for all permanent improvements put upon the land bought, and by requiring them to pay for the rents and profits of said lands from June 9, 1869, and by doing all other things necessary and proper to put all persons *in statu quo*, and, if necessary, to modify or change the above suggestions as to the mode of so doing in any way which, under the actual circumstances of the case, may be found necessary; and the court shall otherwise proceed with this cause according to the principles laid down in this opinion, and further according to principles governing courts of equity."

When the cause went back to the circuit court, E. P. Hull, F. H. Hull, and Lillie E. Huff, heirs of F. H. Hull, moved the court to put them in possession of the lands of their father

which had been sold under the void decree, but the court refused to do this. We think this should have been promptly done. This court had held that there was really no suit, and that the decree of sale was void; and having directed as the chief, I may say the sole, object of remanding the cause that the parties should be put *in statu quo*, manifestly a restoration of possession to these heirs of the lands improperly sold from them under the void decree was a step—to said heirs the most important step—in the line of action indicated by this court to put the parties *in statu quo*. The decree was the only right by which the purchasers had obtained, or could ask to retain, possession, and that having fallen, what right had they to retain possession?

If it be said that the money of these purchases had gone to pay liens against the land, and the purchasers would be entitled to substitution, and ought to be allowed to retain possession, in order that they might from the rents and profits reimburse themselves, these answers present themselves: 1. No decree had yet been made declaring them entitled to substitution; 2. The suit having been held to be one not properly brought to sell the lands or convene the liens, it could not, in its then state, be made the vehicle of enforcing the right of substitution, as it had no *locus standi in curia*, save only to restore the parties to the *status quo*, the only function which, by fair construction of the former opinion of this court, this court designed said cause thereafter to perform; and 3. At that time the suit of *Dudley and others v. Hull and others*, below more particularly referred to, had not been brought. Should said heirs hereafter ask such possession, it should be given them.

The court made a reference, at the same time this motion for a writ of possession was made, — 1. To ascertain all lands of Hull; 2. All liens thereon; 3. All debts due from his estate; 4. To settle the accounts of his administrator; 5. To ascertain the persons to whom purchase-money from such land sales was paid, and on what account, calculating interest from date of payment; 6. To make an account of rents and profits of each tract sold under the decree from date of confirmation of sale; 7. An account of permanent improvements, showing by whom made.

Now, some of these heads of reference were pertinent to the purpose for which the cause was remanded to the circuit court, and necessary to the execution of the mandate of this court;

but so far as the reference directed the lands of which Hull died seised to be ascertained, and the liens and all the estate debts thereon and the settlement of the personal estate, with the view of converting the suit into a creditors' bill, the court was making the suit perform an office which it could not be made to perform consistently with the decision of this court; and had the suit gone on alone, and been treated as a creditors' bill, the action of so treating it would have been erroneous. All that it could do was to restore possession, and compel restitution from those who had received money under a void and reversed decree, and repay those who had paid for land under it.

But this action of the court, in making a reference so comprehensive, becomes immaterial, by reason of the fact that afterwards Dudley and other persons, who had purchased lands under the said void decree, filed in the circuit court of Pocahontas County a bill against the heirs and administrator of Felix H. Hull, deceased, and others, alleging that Hull died in Highland County, Virginia, leaving a widow and three children, his heirs, owning various lands, and was largely indebted at his death, and his estate, real and personal, in Virginia, had been exhausted in paying his debts, leaving some unpaid; that among those unpaid were several vendors' liens on the lands in Pocahontas, to wit, one reserved to A. G. Mathews on certain tracts, and assigned to James H. Renick, and one to Mary Ann Mathews on certain land, and one in favor of Joseph McClung on certain lands; and alleging that Hugh Sheffy, administrator of Felix H. Hull, and Elizabeth M. Hull, his widow, had brought a suit in that court against the heirs of Felix H. Hull and others, asking to have said lands sold, and dower of said widow provided for out of their proceeds, and to have the balance of such proceeds applied to discharge such liens on said lands; and that a decree of sale had been made in said suit, and that said plaintiffs and certain defendants had purchased certain tracts, respectively, at certain prices, under such decree; and that the purchase-money under such sales had been collected and applied under decree in the cause to the debts of Hull, to his widow, to attorneys and court officers for services in the cause; and then Felix H. Hull filed a petition to set aside the decrees in the cause; that the circuit court had refused to set aside such sales; that the case was appealed to the supreme court of appeals, which had held all the proceedings in the cause void, and re-

versed the said decree, and remanded the cause to the circuit court for the purpose of placing the parties *in statu quo*; and alleging, further, that since the payment of the purchase-money for lands sold under said void decree, many of the creditors had become insolvent; and praying that the accounts of the West Virginia administrator of said Felix H. Hull, deceased, be settled, and his creditors convened, and that those who had purchased lands under such void decree, and whose money had been applied on debts and liens of said decedent, be subrogated to the rights of the creditors whose debts the money of such purchasers had gone to pay.

The said two causes, that of *Dudley and others v. Hull and others*, and that of *Hull's Adm'r et al. v. Hull's Heirs and others* (the Sheffy suit), were heard together, and a reference was made to a commissioner to ascertain all the lands of which Felix H. Hull died seised lying in Pocahontas, and all liens thereon; all debts due from his estate; to settle the administrator's accounts; to ascertain all purchase-money paid by several purchasers of land sold under decree in the case of *Hull's Adm'r v. Hull's Heirs*; the amounts paid by each, and the date of payment, and to whom paid, and on what account, calculating interest from dates of payment; and to make an account of rents and profits of each tract which had been sold, and an account of all permanent improvements on each tract, showing by whom made. Upon a report, the court rendered a decree in the two causes, heard together in June, 1888, by which it confirmed the report, and decreed that unless the debts by it reported be paid, the lands should be sold; and from this decree Samuel Gibson, administrator of Felix H. Hull, has appealed to this court.

It is urged by appellant that these plaintiffs in the new bill, *Dudley and others*, cannot maintain a creditors' bill, because they are not creditors of Hull. Technically, they are not creditors, but only entitled to substitution under those who are creditors; but if so entitled, they get the rights of those who are creditors, and those creditors could maintain a creditors' bill, and if the debts which their money paid were liens, they must or could convene the lienors, and if not liens, they must convene the creditors generally, for they could only get a *pro rata* share in case of deficiency of assets. Though I do not see that the court decreed the debts against Hull's estate, or directed the money arising from the sale to be paid thereon, yet if in fact they were paid thereon, we must treat *Dudley*

and others, plaintiffs in the new bill, as entitled to substitution to the debts which were paid by the moneys which they paid as purchasers under the void decree; for the case of *Haymond v. Camden*, 22 W. Va. 180, holds that "a purchaser of land sold under a void decree is entitled, upon the disaffirmance of the sale, to be substituted to the rights of the creditor, and charge the land with the amount of the debts paid by him." See *Hudgin v. Hudgin*, 6 Gratt. 320; 52 Am. Dec. 124.

The position of appellant's counsel, that in *Haymond v. Camden*, 22 W. Va. 180, substitution was allowed only because Camden and Andrews asked that the debt might be ascertained, is untenable. The court gave that as a reason why, though the proceeding was void for want of jurisdiction as to them, substitution could be made in that proceeding, holding that they thereby waived objection to jurisdiction, save in those respects they excepted to it and submitted to the jurisdiction. The court, however, held the general proposition in a separate point that a purchaser under a void decree is entitled to be substituted to the debts his money pays. Principles of justice demand this, and courts of equity have raised up this principle, a being of their creation, called "substitution," unknown to common-law forums, to accomplish the ends of justice; and I know of no more signal instance to exemplify the disposition, as well as the power, of equity to adopt means to accomplish right than this of substitution, accorded purchasers under void proceedings, whose money has gone to satisfy liens good against the debtor.

Another point made against the decree is, that the most important parties, the heirs of Hull, whose lands were to be sold, were not before the court, because the affidavit on which rested the order of publication against them as non-residents was made before a notary in Virginia, and the certificate is simply signed by him, and is without notarial seal, and also wants a certificate of a clerk or other officer of a court of record of Virginia under official seal, verifying the genuineness of the signature of the notary, and his authority to administer oaths, as required by Code, c. 130, sec. 31.

This objection is well taken. A party must be served with process, and thus brought before the court, unless he be one against whom publication may be made, and the fact justifying such order must be made to appear as the law points out. The law requires an affidavit to establish that fact as a pre-

requisite or foundation for the order, and that affidavit, if made out of the state, must be certified as required by statute, to be admissible to show the fact of non-residence. Though the decree states that the non-residents had been "regularly proceeded against by order of publication, as the law provides," yet the affidavit and order, being a part of the record, show this defect. Though this be error, yet I do not think it avails the appellant, the administrator. Still, it should be corrected in after proceedings, as it might affect titles acquired under a decree hereafter. The decree does not declare on its face what particular debts shall be paid, or fix their order, but simply decrees that "unless the defendants, the administrator and heirs of the late F. H. Hull, deceased, or some one for them, shall, within sixty days from the rising of this court, pay to the special receiver in these causes the several debts reported by Commissioner Warwick against the estate of F. H. Hull, deceased, the lands should be sold." Such a decree is erroneous under the case of *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

Judge Woods very properly said, in the opinion in that case: "Upon its face, it [the decree] neither ascertains the amount or priority of any debt, or the person to whom the same is to be paid"; and as he said in that case, I say in this, that while the decree does refer to the report for the debts to be paid, that leaves every creditor to determine for himself, at his peril, the amount decreed him. I add, that this report is complicated. A given debt is a specific lien on certain other lands, and a general charge on others; another debt is a specific lien on certain other lands, and a general charge on others; and other debts general charges. The special commissioner and parties are to construe this report for themselves, at their peril, and fix the amounts of liens, their order, and what lands they bind; whereas the decree should make these matters legally certain.

What debts were to be paid under this decree? The decree should have plainly declared what original debts of Hull yet remained unpaid, and what particular purchasers were entitled to substitution, and in what sums, and out of what lands, after charging them with rents and profits, less permanent improvements and taxes paid. The heirs would know then how much was chargeable upon their estate, and in whose favor, if they desired to discharge it, and in case a sale should be made, every original creditor would know how much was

coming to him, and every purchaser would know how much he was entitled to for reimbursement or substitution; and thus they could bid at the sale with their eyes full open to their adjudicated rights.

As to the debts reported against Hull's estate, it is scarcely necessary to say that the parties claiming substitution on account of moneys paid by them under their purchases of land having been applied on debts of Hull's estate must show debts valid and binding said estate. The appellant's counsel contends that there was no evidence to establish the debts reported as debts binding Hull's estate. And here it is certain that the pleadings, depositions, or decrees in the case of *Sheffy, Adm'r, v. Hull's Heirs*, in Pocahontas circuit court, cannot be read as evidence against the heirs or administrator of Hull to establish debts, for reasons already stated. It is also clear that the record of the case of *Sheffy, Adm'r, etc., v. Hull's Heirs*, brought in Highland County, Virginia, cannot be read to establish such debts. It was the same character of suit as that brought in Pocahontas by Sheffy, administrator, and Mrs. Hull against Hull's heirs, which this court held to be a void proceeding; but, in addition, that Highland County suit was brought in another state to sell land and operate on personal assets there, and could by no means affect lands here; and the West Virginia administrator was not a party to it; and if the infant heirs were parties, it could not establish debts not decreed against them personally, so as to bind lands here. The decree was only that, unless the estate debts be paid, the lands be sold.

The debt in favor of James H. Renick is sustained by the agreement of sale between Andrew Mathews and Felix H. Hull, dated the 13th of October, 1853, in connection with Uriah Hevener's deposition.

As to the bond of \$757.87 in favor of Ann M. Mathews, the evidence is not clear to show that it is a remnant of purchase-money for land sold by Sampson Mathews to Hull and Warwick. The bond is of different date from the sale and deed, but is claimed to be a balance on settlement. As the deed from Mary Ann and Ann M. Mathews to Hull and Warwick, which must have been accepted by the grantees and put on record, recognizes money as yet unpaid on land, and the bond is signed by Hull and Warwick, the same parties alleged to have purchased the land, and as John W. Warwick's deposition virtually recognizes it as a purchase-money bond, I think

we should say that it is established. Though given after said deed, being for purchase-money, it is entitled to the lien retained in the deed, as a release of the lien would not be presumed from the mere execution of a new bond: *Hess v. Dille*, 23 W. Va. 90; *Coles v. Withers*, 33 Gratt. 186; 2 Jones on Mortgages, sec. 927; *Hopkins v. Detwiler*, 25 W. Va. 749.

As to debts of estate of Joseph McClung, I think the deed from McClung and wife to Hull, dated the 26th of September, 1855, found on record, and Hull's bond of \$2,500, of same date, to McClung, justify the report in considering that debt established; but there is no evidence to sustain the item of \$932.55, reported in favor of McClung's estate, except the Highland County record, which is incompetent, and it is barred by the statute of limitations. I think the claim of Hull's administrator for abatement from McClung's debt for loss of the five hundred acres was properly overruled. The deed of McClung and wife conveyed "their entire interest in the lands formerly owned by Jacob W. Mathews" in certain specified lands, "together with all their interest in the lands formerly belonging to said Mathews lying on Clover Creek."

Where a deed conveys the grantor's right, title, and interest, though it contains in general terms a covenant of general warranty, the covenant is regarded as a restricted one, limited to the estate conveyed, and not one defending generally the land described. The covenant of warranty is intended to defend only what is conveyed, and cannot enlarge the estate conveyed: *Wait's Actions and Defenses*, 391; 3 Washburn on Real Property, 655; *Rawle on Covenants*, 420; *Sweet v. Brown*, 12 Met. 175; 45 Am. Dec. 243; *Allen v. Holton*, 20 Pick. 458; *Ballard v. Child*, 46 Me. 152; *McNear v. McComber*, 18 Iowa, 12; *Kimball v. Semple*, 25 Cal. 452; *Blanchard v. Brooks*, 12 Pick. 47; *White v. Brokaw*, 14 Ohio St. 339; *Adams v. Ross*, 30 N. J. L. 510; 82 Am. Dec. 237; *Lamb v. Wakefield*, 1 Saw. 251; *Hope v. Stone*, 10 Minn. 141. Here the grantors conveyed only their interest. The land was in dispute, and Porter seems to have had superior title to it; and besides, the evidence tends to show that the deed does not cover the five hundred acres claimed as lost land.

The debts of Renick, Mathews, and McClung, above mentioned, are purchase-money liens, and are not barred by the statute of limitations: *Heiskell v. Powell*, 23 W. Va. 718; *Wayt v. Carwithen*, 21 W. Va. 522. A lien for purchase-money reserved in a deed is treated as a mortgage or deed of trust, and the

statute of limitations does not apply: *Coles v. Withers*, 33 Gratt. 186, 194; *Smith v. Washington etc. R. R. Co.*, 33 Gratt. 620; *Lewis v. Hawkins*, 23 Wall. 119. It is clear that the statute does not run against mortgages and deeds of trust: *Criss v. Criss*, 28 W. Va. 396; *Camden v. Alkire*, 24 W. Va. 675; *Pitzer v. Burns*, 7 W. Va. 63; *Bowie v. Poor School Soc.*, 75 Va. 300.

The debt reported at \$5,335.05, in favor of Benjamin F. Jackson, is not only not proven except by evidence in the Highland cause, but is for an open account, the last item being in October, 1861, and is barred, and was improperly allowed. So, also, the Samuel V. Gatewood debt of \$1,226.68 is not proven, except by the Highland record, and is barred by limitation. The suit in Highland County could not operate to protect debts against the statute of limitation as to assets in West Virginia. There was no personal decree against the heirs; simply a decree ascertaining certain debts as existing against Hull's estate for the purposes of that cause, — that is, against the Virginia lands of the estate, — and was only a decree adjudicating such debts as existing by confirming a report finding them. And besides, it was a suit brought by the Virginia administrator and the widow to sell lands for debts, which they could not do, as there was no such statute as in this state allowing an administrator to maintain such a suit, and the widow could not do so; and as decided in *Hull v. Hull*, 26 W. Va. 1, such a suit was inefficacious to accomplish the purpose of keeping alive these debts. The suit in Pocahontas by said Sheffy, administrator, and the widow of Hull, being void, could not keep alive those debts; nor would the bringing of the suit of Dudley and others, within one year after the reversal by this court in the case of *Hull v. Hull*, 26 W. Va. 1, operate to save the debts from limitation, under section 19, chapter 104, of the code, as it was a void proceeding. It does not in fact appear that the Dudley suit was brought within one year after the 25th of April, 1885, the date of such reversal, as the summons in it is not in the record.

I think the land owned by Hull jointly with others should have been divided before sale. I do not think that the parties claiming substitution had right to set off one third of rents and profits as for land to which the widow of Hull was entitled, and be charged with only two thirds of rents and profits. A widow has no estate by reason of her dower right till it is actually assigned: *Tomlinson v. Nickell*, 24 W. Va.

160; *Nickell v. Tomlinson*, 27 W. Va. 709. I find no decree assigning her dower, or declaring the money value of it, or directing its payment. It was probably in the power of the court to appoint a special receiver to receive and disburse the moneys under the sale, but I do not see why special commissioners could not do so, after giving bond.

The decree complained of is reversed, and the cause remanded, to be further proceeded in according to the principles herein indicated, and further according to principles governing courts of equity.

JUDICIAL SALES — RIGHT OF PURCHASER TO SUBROGATION. — This subject was fully discussed in the note to *Perry v. Adams*, 2 Am. St. Rep. 328-330, where reference is made to an earlier note to *Scott v. Dunn*, 30 Am. Dec. 177-182. Compare *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768. If such purchaser has been in possession a long time, he will not be compelled to surrender the land on any terms, unless the parties show good cause for the delay: *Dawkins v. Dawkins*, 104 N. C. 301; and where the duration of the possession has been sufficient to give title by the statutory rules relating to adverse possession, it will constitute a bar to an action of ejectment by any one not under disability: *Goodman v. Nichols*, 44 Kan. 22. The purchaser, to be protected in this way, must be an innocent purchaser; and therefore a person who buys with notice that the land is subject to a trust is not entitled to subrogation: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232. See also *Wilson v. Slaughter*, 53 Ark. 137, — a case where the purchaser had notice of existing equities.

SERVICE OF PROCESS BY PUBLICATION. — Jurisdiction is acquired only when the statutory requirements are successively and accurately pursued: *Beckett v. Cuenin*, 15 Col. 281; 22 Am. St. Rep. 399; and note to *Shepherd v. Ware*, 24 Am. St. Rep. 217. Affidavit of service of summons is sufficient, when it shows a cause of action against the defendant, and that he is a resident at a place in another state, which place and state are named in the affidavit: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34. *Contra*, see *McCracken v. Flanagan*, 127 N. Y. 493; 24 Am. St. Rep. 481, which holds that, in addition to the above facts, due diligence to find defendant must be shown. For two examples of defective affidavits, see *Godfrey v. Valentine*, 39 Minn. 336; 12 Am. St. Rep. 657; *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198. Corrected affidavit may be filed, where the corrected affidavit sets forth what is true, and establishes compliance with the law: *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198; *Burr v. Seymour*, 43 Minn. 401; 19 Am. St. Rep. 245.

JUDICIAL SALES. — Administrator's or executor's sale is void unless the provisions of the statute are strictly pursued: *Worten v. Howard*, 2 Smedes & M. 527; 41 Am. Dec. 607; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677.

JUDGMENTS AS EVIDENCE. — A void judgment cannot be regarded as having any legal existence in any court for any purpose: *White v. Foote L. Co.*, 29 W. Va. 385; 6 Am. St. Rep. 650.

JURISDICTION OF COURTS AS AFFECTED BY STATE LINES. — Courts of one state have no jurisdiction over title to lands in another state or country: *Lin-*

dley v. O'Reilly, 50 N. J. L. 636; 7 Am. St. Rep. 802. No court can, by its judgments or decrees, directly bind or affect property beyond the limits of that state: *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126. Several cases illustrating this principle are cited in the note to *Alley v. Caspari*, 6 Am. St. Rep. 182.

DISCHARGE OF VENDOR'S LIEN. — When the lien once existed, it still continues, unless intentionally displaced or waived by consent of the parties: *Hays v. Horine*, 12 Iowa, 61; 79 Am. Dec. 518; see illustrative cases in the note to *Burgess v. Fairbanks*, 17 Am. St. Rep. 232.

EFFECT OF JUDGMENT TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS. — As to when judgment in ejectment will stop the running of the statute, see note to *Batterton v. Chiles*, 54 Am. Dec. 545-547. The revival of a judgment, void for want of jurisdiction of the person of the defendant, will not stop the running of the statute: *Hepler v. Davis*, 32 Neb. 556; *ante*, p. 457.

COVENANT OF WARRANTY attaches only to the estate granted or purported to be granted, and can neither enlarge the estate nor pass by estoppel a greater estate than that actually conveyed: *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237. As to the effect of a covenant in a conveyance of grantor's right, title, and interest, see note to *Sweet v. Brown*, 45 Am. Dec. 244.

EXTINGUISHMENT OF VENDOR'S LIEN. — As against a remote vendee, a vendor's lien does not subsist after the statute of limitations has run against a note given for the purchase-money: *Tate v. Hawkins*, 81 Ky. 577; 50 Am. Rep. 181. The lien of a vendor of land reserved on the face of the deed expires when the debt is barred by the statute of limitations: *Chase v. Cartwright*, 53 Ark. 358; 22 Am. St. Rep. 207, and note.

DOWER, EFFECT OF JUDICIAL SALES UPON WIFE'S RIGHT TO: See *Williams v. Wescott*, 77 Iowa, 332; 14 Am. St. Rep. 287; *Mandel v. McClave*, 46 Ohio St. 407; 15 Am. St. Rep. 627.

WATT v. BROOKOVER.

[26 WEST VIRGINIA, 828.]

JUDGMENT IN FAVOR OF DECEASED PLAINTIFF. — A judgment in favor of a plaintiff who is dead at the time of the institution of the action, such death not appearing on the record, creates a valid lien, and is not void, but merely voidable on appeal, and is impervious to collateral attack.

JUDGMENTS FOR OR AGAINST DECEASED PERSONS, whether the fact of death appears on the record or not, are not void, but voidable only.

ATTORNEY, POWER OF, TO COMPROMISE CLAIM AFTER JUDGMENT. — An attorney, employed merely as such to collect a debt, has no power to compromise the claim after judgment.

Keck and Son, for the appellants.

Berkshire and Sturgiss, for the appellees.

BRANNON, J. A judgment was rendered in the circuit court of Monongalia County in favor of plaintiffs for \$307.22, with interest and costs, in an action by Watt, Lang, & Co. for the

use of Stephen A. Shepherd, against Joseph S. Brookover; and a chancery suit was brought by Watt, Lang, & Co. and Shepherd against Brookover to enforce the judgment against a tract of forty-five acres of land, and the bill having been dismissed, the plaintiffs appeal to this court.

It is assigned as error that an amended answer was allowed to be filed by Brookover. He filed an answer, setting up that he had compromised and settled the judgment, and the cause was then referred to a commissioner to ascertain the lands of the judgment debtor and the liens upon it. Depositions were taken by both sides. The commissioner filed a report allowing the plaintiffs their debt in full, and Brookover excepted to it. Then the decree of dismissal was entered. In this decree it is stated that an answer and amended answer of Brookover were read, though I see no prior order filing such amended answer. This amended answer sets up that defendant Brookover had learned, since the filing of his original answer, that John W. Watt of the firm of Watt, Lang, & Co., a plaintiff in the chancery suit, and also in the action in which the judgment had been rendered, had died before the action at law was brought, and that the said judgment was a nullity and void, and no lien on his land. The plaintiff objected, and excepted to said amended answer as irrelevant and immaterial, and as offered too late. The decree does not pass on the exception, but reads the amended answer on the hearing, and impliedly overrules the exception.

It is sufficient to say of this answer, that though taken to be true in the absence of a replication, the fact which it presents as a defense — the death of Watt — was immaterial, and presented no defense to the bill. As regards a judgment against a party dead at its rendition, this court, in *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687, held such judgment not void for the fact of death not appearing on the record, and that it was a lien enforceable in chancery, and such death could not be set up in defense of a bill to enforce it. In *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105, it was held that the death of a defendant not having been suggested, a decree cannot be impeached in a collateral action by evidence of his death. I think these decisions are binding authority on us, and in principle decide this point in the case. I shall not advert to the many decisions upholding them, as President Johnson fully discussed them in *King v. Burdett*, 28 W. Va. 601; 57 Am. Rep. 687. In *Neale v. Utz*, 75 Va. 480, a judg-

ment against a convict was held unimpeachable in a collateral proceeding, though the party was *civiliter mortuus*.

True, these cases were cases of judgment against persons, while here it is the case of one of the partners plaintiff dead at the institution of the action; but I concur in the opinion expressed in 1 Black on Judgments, section 204, that such a case "cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (section 200), the great preponderance of authority sustains the rule that the judgment is at least impervious to collateral attack, and must be vacated or reversed by proper proceedings. Both cases are equally governed by the principle that when once the jurisdiction has attached, no subsequent error or irregularity in the exercise of that jurisdiction can make its judgment void." Here the party was dead at the institution of the action in which judgment was rendered. Mr. Black (1 Black on Judgments, sec. 204) states the law to be, that "if an action is commenced in the name of a person already dead (as where the decedent is the nominal plaintiff, and the one for whose benefit the suit is prosecuted is the real party in interest), or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed." The fact that defendant did not know of his death can make no difference as to this point.

In *Powell v. Washington*, 15 Ala. 803, it was held that where one having the beneficial interest in a note sued in the name of a dead payee, and there was judgment by default, the judgment was valid, and could not even be vacated by a proper proceeding to vacate it.

In *Milam Co. v. Robertson*, 47 Tex. 222, and *Case v. Ribelin*, 1 J. J. Marsh. 29, it was held that a judgment for or against a party dead at the time, his death not appearing, is not void. Freeman on Judgments, section 153, states it as law that judgments for or against deceased parties are not void, and that even where the fact of the death appears in the record, they are not void, but only voidable, and are to be affected only by appeal.

I am of opinion that where the fact of death is apparent in the record of the judgment, its rendition would be error of law, to be corrected by appellate process; and where it does not appear in the record, but is to be shown *aliunde*, it is called

error in fact, to be corrected at common law by writ of error *coram vobis*, but under our code (1887), c. 135, sec. 1, by motion in lieu of that writ: 2 Tuck. Com. Laws Va., 328; 4 Minor's Institutes, 848.

I do not intimate whether this judgment could have been affected in any way, whether the naming as a plaintiff a dead partner, when the cause of action survived to the other, who was also a party, would render the judgment erroneous. Some cases cited by authors as holding that judgments against dead persons are null do not so hold. The word "void" may be used in them, but in the sense of "erroneous." They were cases where, by proper proceedings, they were sought to be reversed, not attacked collaterally. Such are the cases of *Colson v. Wade*, 1 Murph. 43; *Burke v. Stokely*, 65 N. C. 569; *Moore v. Easley*, 18 Ala. 619. There is a wide difference between a judgment null and void and one erroneous and voidable; the one is no lien, the other is until reversed. This judgment is not a nullity, but a valid lien on the land sought to be subjected.

Now as to the defense of payment. The defendant Brookover gives evidence to show that he compromised the judgment with Hough, one of the firm of Kreck and Hough, attorneys, who recovered the judgment, and paid Hough one hundred dollars in satisfaction of it. In *Wiley v. Mahood*, 10 W. Va. 206, and *Harper v. Harvey*, 4 W. Va. 539, it was held that an attorney employed to collect a debt can only receive money for payment, and cannot, without authority, accept other things in satisfaction of it. Here money was received, but much less than the debt. Is this compromise valid? Has an attorney to collect a debt authority, simply as such, to compromise and accept only part of a debt as full satisfaction? Chief Justice Marshall, in *Holker v. Parker*, 7 Cranch, 436, said that he had not. I do not here refer to the question of the power of an attorney to compromise pending litigation to obtain judgment. In England it seems to be settled in such case that he has authority to compromise, but in America there is great conflict of decision on the subject, the preponderance of authority seeming to be against such power, though, as that point is not involved here, I have not fully examined the authorities: See note to sec. 24, Story on Agency, 9th ed.; *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647; note to *Granger v. Batchelder*, 41 Am. Rep. 847; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec.

491; *Huston v. Mitchell*, 14 Serg. & R. 307; 16 Am. Dec. 506; 1 Lawson's Rights, Remedies, and Practice, sec. 171, and notes.

This is a case where there was no appearance of contention as to the right to the debt, and its amount had been fixed by final judgment; but there was some considerable doubt whether the judgment could be realized. It is clear that no express authority to compromise the debt was given. We are of opinion that in these circumstances the attorney had no implied authority to receive part of the judgment in full. In *Granger v. Batchelder*, 54 Vt. 248, 41 Am. Rep. 846, an attorney received part of a judgment in money, and the execution which had been levied on property claimed by others was returned satisfied. The court held that the attorney had no power to receive less than the full amount. So in *Robinson v. Murphy*, 69 Ala. 543, the supreme court of Alabama said that the judgment terminated the litigation and its uncertainties, and conclusively ascertained that the plaintiff was to have from the defendant a fixed amount; that the powers of the attorney are not co-equal and co-extensive with those of the client, and he could accept nothing less than the full amount of the judgment. See note to *Granger v. Batchelder*, 41 Am. Rep. 847. So it was held in *Beers v. Hendrickson*, 45 N. Y. 665; *Lewis v. Woodruff*, 15 How. Pr. 539; *Wilson v. Wadleigh*, 36 Me. 496; *Harrow v. Farrow*, 7 B. Mon. 126; 45 Am. Dec. 60; *Chambers v. Miller*, 7 Watts, 63; *Town of North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; 1 Lawson's Rights, Remedies, and Practice, 171; 2 Black on Judgments, sec. 989. I see no authority to the reverse.

But though this compromise will not discharge the judgment, we think the judgment should be credited with one hundred dollars, paid under said compromise as of the fifteenth day of April, 1884. Here it is useless to detail evidence further than to say that Brookover swears positively to the payment, and Gallagher that he saw the receipt, since lost, which had been given by Hough. The evidence is not entirely convincing, but we conclude that it should be allowed.

The decree is reversed, and the cause remanded, with direction to enter a decree for the judgment, subject to such credit, and to enforce it as a lien against the land in the record described.

Judgments for or against Deceased Persons.*

Generally only Voidable, and not Subject to Collateral Attack. — Although there is some conflict in the cases, the great weight of American authority sustains the proposition, that where a court has obtained jurisdiction of the parties and of the subject-matter during the lifetime of the parties to the suit, a judgment rendered for or against one of them after his death, although erroneous and liable to be set aside by proper direct proceeding, is simply voidable, and not void, nor subject to collateral attack: *Jennings v. Simpson*, 12 Neb. 558; *McCormick v. Paddock*, 20 Neb. 486; *Clafin v. Dunne*, 129 Ill. 241; 16 Am. St. Rep. 263; *Mitchell v. Schoonover*, 16 Or. 211; 8 Am. St. Rep. 282; *King v. Burdett*, 28 W. Va. 601; 57 Am. Rep. 687; *Warder v. Tainter*, 4 Watta, 270; *Carr v. Townsend*, 63 Pa. St. 202; *Yaple v. Titus*, 41 Pa. St. 195; 80 Am. Dec. 604; *Murray v. Weigle*, 118 Pa. St. 159; *Wallace v. Center*, 67 Cal. 133; *Phelan v. Tyler*, 64 Cal. 80; overruling *Rhoad v. Corbett*, 32 Cal. 493; *McCreery v. Everding*, 44 Cal. 284; *Camden v. Robertson*, 2 Soam. 507; *Stoetzell v. Fullerton*, 44 Ill. 108; *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336; *Taylor v. Snow*, 47 Tex. 462; 26 Am. Rep. 311; *Milam County v. Robertson*, 47 Tex. 222; *McClelland v. Moore*, 48 Tex. 355; *Fleming v. Seeligson*, 57 Tex. 524; *Harrison v. McMurray*, 71 Tex. 122; *Evans v. Spurgin*, 6 Gratt. 107; 52 Am. Dec. 105; *Neale v. Uta*, 75 Va. 480; *Powell v. Washington*, 15 Ala. 803; *Collins v. Mitchell*, 5 Fla. 364; *Holt v. Thacher*, 52 Vt. 592; *Sausey v. Antram*, 24 Ohio St. 87; *Reid v. Holmes*, 127 Mass. 326; *Case v. Rixlin*, 1 J. J. Marsh. 29; *Spalding v. Wathen*, 7 Bush, 659; *Coleman v. McAnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Union Bank v. McWharters*, 52 Mo. 34; *Gilman v. Donovan*, 53 Iowa, 362; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547; *Lynn v. Lowe*, 88 N. C. 478; *Hayes v. Shaw*, 20 Minn. 405; *Berkey v. Judd*, 27 Minn. 475; *Stocking v. Hanson*, 22 Minn. 542; *McMillan v. Hickman*, 35 W. Va. 706. The late case of *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, declares that "the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding it is valid." Another late case decides that a judgment rendered in an action against a party after his death, the death being unknown to the court or the other parties, is not void, but merely irregular and voidable, and may be set aside upon proper application in the action, by motion made within a reasonable time: *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547. So in *Hayes v. Shaw*, 20 Minn. 405, 407, the court said: "The court, having acquired jurisdiction of the parties, possesses the power to proceed to the final disposition of the action; and while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous, is not on that account to be attacked in a collateral action. In other words, the judgment is voidable only when properly assailed, but not void." In *Gilman v. Donovan*, 53 Iowa, 362-364, it was said that "the reason of the rule seems to be, that the death of the party pending the action can only be pleaded in abatement, and evidence of such fact could not be admitted under the general issue or other pleading which presented issues as to the merits. The judgment being a verity, it must, at

* REFERENCE TO MONOGRAPHIC NOTES.

Judgment against deceased person, validity of: 52 Am. Dec. 107-110.

least in another action, be conclusively presumed that the party was living when it was rendered." A judgment rendered against a person after his death, and after service of process and appearance, but without the fact of the death appearing on the record, is irregular, and will be set aside in a direct proceeding for that purpose, the object being, that the representative may have an opportunity to resist a recovery: *Lynn v. Lowe*, 88 N. C. 478. The method of avoiding the effect of such a judgment by direct proceeding must depend upon the state of the record and the practice prevailing in the jurisdiction where the judgment is rendered. Thus a judgment rendered for or against a person after his death may be reversed on motion, if the fact and time of the death appear on the record, or in error *coram nobis*, if the fact must be shown *alibi*, but such judgment is merely voidable, and not void, and cannot be impeached collaterally: *Jennings v. Simpson*, 12 Neb. 558; *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336. A judgment against a deceased person over whom the court had obtained jurisdiction in his lifetime may be reversed on error if his death appears from the record. Otherwise it may be vacated on motion in the court where it was rendered: *Clafin v. Dunne*, 129 Ill. 241; 16 Am. St. Rep. 263. So a judgment rendered when both plaintiff and defendant are dead is erroneous and voidable, but relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment: *McClelland v. Moore*, 48 Tex. 355.

Judgments for or against Joint Plaintiffs or Defendants, one of whom is dead at the time of the rendition of the judgment, are, like judgments against or for a sole defendant or plaintiff after his death, merely erroneous, and voidable, but not absolutely void, nor subject to collateral attack: *Holt v. Thacher*, 52 Vt. 592; *Swasey v. Antram*, 24 Ohio St. 87; *King v. Burdett*, 28 W. Va. 601; 57 Am. Rep. 687; *Stoetzell v. Fullerton*, 44 Ill. 108; *Camden v. Robertson*, 2 Scam. 507; *Boor v. Lowrey*, 103 Ind. 468; 53 Am. Rep. 519. Thus in a joint action against two or more, where all are served with process, and one dies before judgment, but his death is not suggested on the record, and judgment is rendered against all, the judgment so rendered is not subject to collateral attack: *King v. Burdett*, 28 W. Va. 601; 57 Am. Rep. 687. So where one of the defendants, in an action on a joint contract, dies before judgment, and the judgment is taken against all the defendants, without any suggestion of his death, or making his representative a party, the judgment is merely voidable, and not void: *Swasey v. Antram*, 24 Ohio St. 87. When, in a joint action of *assumpsit* on account by two plaintiffs, one of them dies pending suit, and judgment is afterwards rendered therein, without suggestion of such death having been made on the record, or plea of death in abatement having been interposed by the defendant, he is bound by the judgment, and cannot afterwards question it in a collateral proceeding: *Stoetzell v. Fullerton*, 44 Ill. 108.

Judgments for or against Deceased Party Void in Some Jurisdictions.—The doctrine prevailed at common law that an action abated by the death of a plaintiff or defendant therein, and that a judgment rendered after such death was void. This rule has been adopted in some of the states, and where it prevails, a judgment for or against a person rendered subsequently to his death, although the court acquired jurisdiction of the parties during their lifetime, is absolutely null and void. In these states such a judgment may be entirely disregarded by all parties. The representatives of the decedent, his creditors, or any one interested, need not take any steps to have the judgment vacated or reversed. It may be attacked and overturned,

either directly or collaterally, whenever presented for any purpose, by proof of the death of the party for or against whom it was rendered, prior to its rendition. It does not create any lien or estoppel, nor is it binding, as adjudicating any rights. It cannot operate to support or divest any right, title, or interest: *Gerault v. Anderson*, Walk. (Miss.) 30; 12 Am. Dec. 521; *Lee v. Gardiner*, 26 Miss. 521; *Parker v. Horne*, 38 Miss. 215; *Tarleton v. Cox*, 45 Miss. 431; *Young v. Pickens*, 45 Miss. 553; *West v. Jordan*, 62 Me. 484; *New Orleans etc. R. R. Co. v. Bosworth*, 8 La. Ann. 80; *Norton v. Jamison*, 23 La. Ann. 102; *McClosky v. Wingfield*, 29 La. Ann. 141; *Edwards v. Whited*, 29 La. Ann. 647; *Succession of Hoggatt*, 36 La. Ann. 337; *Meyer v. Hearst*, 75 Ala. 390; *Carter v. Carriger*, 3 Yerg. 411; 24 Am. Dec. 585; *Morrison v. Deaderick*, 10 Humph. 342; *Collins v. Knight*, 3 Tenn. Ch. 187; *Lynch v. Tammell*, 4 Harr. (Del.) 284. In *Life Ass'n v. Fassett*, 102 Ill. 315-325, the court said: "A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained or the suit commenced before the death of the party makes no difference in this respect." This rule as to judgments against natural persons is still in force in Illinois, as is shown by this case. But it also maintains that a judgment in favor of a dead plaintiff or plaintiffs, who died pending the action, must be taken advantage of by plea in abatement; otherwise it will be binding on the defendant; and in this connection the court said: "We are of opinion, however, there is a just ground for distinction in the two classes of cases. Where a suit is being prosecuted in the name of a dead plaintiff, the defendant may well plead the fact in abatement, and there is no great hardship in holding that if he does not so take advantage of it, the judgment shall bind him when collaterally drawn in question. In the nature of things, the deceased defendant cannot plead in abatement, or otherwise interpose the fact of his own death, and his legal representatives, until brought into court by the plaintiff, as contemplated by the statute, are not supposed to be present, or to know anything about the pendency of the suit, and to hold a judgment obtained under such circumstances binding upon them would seem not only inconsistent with well-settled principles, but would probably lead to the perpetration of great frauds. We are therefore clearly of opinion such judgments are, as already stated, absolutely void." This case is expressly overruled on the latter point by *Claffin v. Dunne*, 129 Ill. 241; 16 Am. St. Rep. 263. A judgment against a dead person is a nullity, and a sale of property thereunder confers no title on the purchaser: *Parker v. Horne*, 38 Miss. 215. So a judgment against a party at the time deceased is void, although his sole executor was also defendant in the same action, but in his individual capacity: *Bragg v. Thompson*, 19 S. C. 572. In the states where the foregoing doctrine prevails, a judgment for or against joint plaintiffs or defendants, after the death of one of them, is absolutely void as to all of them, as well as for every other purpose: *Young v. Pickens*, 45 Miss. 553; *McCloskey v. Wingfield*, 29 La. Ann. 141.

Jurisdiction must be Acquired before Party's Death. — The better rule would seem to be, that to invest a judgment for or against a dead man with any validity, it is absolutely essential that jurisdiction should have attached during the lifetime of the plaintiff or defendant, and that if the action is commenced in favor of or against one already dead, the judgment rendered therein will be absolutely null and void for want of jurisdiction: *Bollinger v. Chouteau*, 20 Mo. 89; *Williams v. Hudson*, 93 Mo. 524; *Crosley v. Hutton*, 98

Mo. 196; *Graves v. Ewart*, 99 Mo. 13; *Jacobson v. Campbell*, Sup. Ct. Ark., Jan. 11, 1890; *Loring v. Folger*, 7 Gray, 505; *Taylor v. Elliott*, 52 Ind. 588; *Griswold v. Stewart*, 4 Cow. 457; *Reid v. Holmes*, 127 Mass. 326-328.

"That there should, at some time during its progress, be living parties to both sides of an action, we think indispensable; and that no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against him must necessarily be void": 1 Freeman on Judgments, 4th ed., sec. 153. This is undoubtedly the sounder rule, although it is in conflict with the principal case, and the subsequent case of *McMillan v. Hickman*, 35 W. Va. 705, in which it was decided that "where suit is instituted in the name of a party who is dead at the time the suit is brought, and process is duly served upon the defendants, who suffer judgment to be rendered against them without pleading the death of the plaintiff in abatement in proper time during the pendency of the suit, the judgment so obtained is not absolutely void, but erroneous only, and such judgment, until reversed in one of the modes prescribed by law, constitutes a lien upon the real estate of the defendant, and may be enforced as other judgment liens, and is not subject to collateral attack." The latter cases are based, partly at least, upon the authority of *Powell v. Washington*, 15 Ala. 803, which decides that where one having the beneficial interest in a note sues in the name of a dead payee, and judgment is rendered by default, the judgment is valid, and cannot be vacated by proper proceeding nor collaterally attacked. This case involves an entirely different proposition from that in dispute in the principal case. In the latter, and in the subsequent case of *McMillan v. Hickman*, 35 W. Va. 705, there was no living plaintiff over whom the court could acquire jurisdiction at the time of the commencement of the action, and the judgment rendered therein was void for want of jurisdiction, according to all the other authorities found upon this particular branch of the subject under consideration. In the case of *Powell v. Washington*, 15 Ala. 803, there was a beneficial plaintiff living at the time of the commencement of the suit, and "probably, if the plaintiff is merely one in whose name an action is prosecuted for the benefit of another, and the defendant, knowing this, does not plead the fact of plaintiff's death, but suffers judgment, he cannot avoid it afterwards on account of such death": 1 Freeman on Judgments, 4th ed., sec. 153.

Judgments against Extinct Corporations. — A judgment obtained in an action against a corporation, commenced after it has become extinct by limitation of time, or has been dissolved for any reason, is void for want of jurisdiction in the court to render it, and it may be collaterally attacked: *Merrill v. President etc. of Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 649; *Sturges v. Vanderbilt*, 73 N. Y. 384; *District of Clay v. District of Buchanan*, 63 Iowa, 188; *Life Association v. Facett*, 102 Ill. 315.

BESS v. CHESAPEAKE AND OHIO RAILROAD CO.

[35 WEST VIRGINIA, 492.]

RAILROADS — LIABILITY FOR WILLFUL ACT OF EMPLOYEE — EXPULSION OF TRESPASSER. — A railroad company is liable for the willful wrong of its employee in expelling a trespasser from its freight train while in motion, to his injury, only upon clear proof that the act was done by such employee in the course of his employment and within the scope of his authority.

VERDICT — INCONSISTENT FINDINGS. — When any separate verdict or special finding is inconsistent with the general verdict, the former must control the latter, and judgment must be rendered accordingly.

Simms and Enslow, for the appellant.

Gibson and Michie, for the appellee.

BRANNON, J. This is a writ of error taken by the Chesapeake and Ohio Railroad Company to a judgment in favor of James Walter Bess, an infant suing by a next friend, against said company, for twelve thousand dollars. On the 23d of January, 1889, there were a number of freight-cars standing on a side-track in the city of Huntington, and said Bess, a boy nine years of age, got upon one of these cars, and an engine hitched to the train, and while moving these cars, Bess, in getting off, received an injury by the wheels mashing his right foot, which necessitated its amputation, and for this injury this suit was brought.

The claim of the plaintiff for recovery was, that while the train was moving, some employee of the company commanded him to get off the car, and he, refusing or hesitating, the employee got upon the car, and the little boy ran to the end of the flat car, stepped upon the bumper of a box-car, and was getting off, having his foot in a stirrup used for descending from the car, holding with his hand to a ladder used for climbing to and from the top, and while there, this employee kicked his hand, causing him to fall, so that his foot got under the wheel. A vital and material question on the trial was the identity of this employee, who he was, and what the character of his employment and his duties.

In addition to its duty of finding a general verdict, the court, under section 5, chapter 131, of the code, required the jury to find upon the following particular questions of fact:—

“1. Was the plaintiff, Walter Bess, a trespasser on the train of the defendant at the time the accident occurred?

“2. Was the fact that he was on the train known to the

defendant before the accident? If so, what agent or servant knew it?

"3. Was the plaintiff injured by being forced to jump off the moving train of the defendant? If so, what agent or servant forced him to jump?

"4. Was the plaintiff kicked by an employee of the defendant and caused to fall under the wheels of the cars? If so, what employee was it?

"5. If the plaintiff, J. Walter Bess, was kicked off the defendant's train by any employee of the company, or forced to jump off by the defendant's employees, who was the employee, and what was his position or employment?

"6. Did any of the employees of the defendant who had control of the train in question kick or force the plaintiff off of the train? If so, who was it?"

The jury made the following answers to the questions propounded by the defendant, viz.: "Answer to question 1: Yes. Answer to question 2: Yes; name unknown to the jury. Answer to question 3: Yes; name unknown to the jury. Answer to question 4: Yes; name unknown to the jury. Answer to question 5: Name and business unknown to the jury. Answer to question 6: Yes; name unknown to the jury."

The defendant moved the court to enter judgment for it on these findings upon the particular questions, but the court refused to do so. Was this refusal error?

This question is to be solved on legal principles. First, the plaintiff, though a child, was in a legal view a trespasser, for he was on the car without right. He was not a passenger. The law draws a marked and sharp distinction between a passenger and a trespasser. In the case of a passenger, the carrier is not allowed to say that the assault or willful wrong of the servant was an excess, outside his duty, and his own personal act.

"It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, though the act of the servant was willful and malicious, as for a malicious assault upon a passenger committed by any of the train-hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and among other

implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants": 2 Wood on Railroads, 1194. There is no inquiry in such case as to whether the wrong to the passenger is within the scope of his authority, or whether his act is wanton. This is a rule largely dictated by public policy, and is based on a duty owing from the carrier to the passenger: Wood on Master and Servant, sec. 321.

But in the case of a trespasser, no duty except abstinence from wanton injury and gross negligence lies upon the carrier, and the rule is different, for, to make the carrier liable, the wrong must be one done by the servant within the scope of his duty and in the course of his business. 2 Wood on Railroads, sec. 316, p. 12, states the principle thus: "While in the case of passengers, because of the contractual duty existing on the part of the company, the question as to whether the servant committing the injury had authority, express or implied, to do so, or in other words, whether it was done in the line of his duty, is not material, yet when the question arises between a trespasser, or one to whom this duty is not owed, and the company, a different question is presented, and the company can only be made liable when authority, express or implied, to do the act is shown. Thus the conductor of a train, being in charge of and having full control over it, represents the company as to any matter connected with its management or control, and for an act done by him in the line of his duty, as by the ejection of a trespasser, etc., the company would unquestionably be liable; but for the act of a brakeman of the train, who, without the direction of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act to which the act complained of is incident is shown, because the act is not one which comes within the scope of his duty." Angell and Ames on Corporations, section 388, after stating that "an action of trespass cannot be sustained against a private corporation for an act done by one of its agents unless done *communicato consilio*; or in other words, unless the act has been directed, suffered, or ratified by the corporation. A corporation is liable for an injury done by one of its servants in the same manner and to the same extent only as a natural individual would be under like circumstances," — adds: "A distinction exists as to the liability of a corporation for the willful tort of its servants towards one to whom the corpo-

ration owes no duty except such as each citizen owes to every other, and that towards one who has entered into some peculiar contract with the corporation, by which his duty is increased. Thus it has been held that a railroad corporation is liable for the willful tort of its servant, whereby a passenger on the train is injured": 1 Shearman and Redfield on Negligence, sec. 154.

In *Weed v. Panama R. R. Co.*, 17 N. Y. 365, 72 Am. Dec. 474, the opinion pointedly draws the distinction, and also *Milwaukee etc. R. R. Co. v. Finney*, 10 Wis. 388. In *Goddard v. Grand Trunk R'y Co.*, 57 Me. 213, 2 Am. Rep. 39, the defendant contended that it was not liable, because the brakeman's assault upon the passenger was willful and malicious, and not directly or impliedly authorized by the company, and the court said: "The fallacy of this argument, when applied to common carriers of passengers, consists in not discriminating between the obligation which he is under to his passenger and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of his duty to servants, the law holds him responsible for the manner in which they execute the trust."

The supreme court of Louisiana drew this distinction so definitely, that when a party was beaten by a porter on a sleeping-car, the Pullman car company was held not liable, because the act was not in the line of the porter's duty, and the person injured had not a berth on the sleeping-car, and there was no contractual relation between him and the company, but he had gone into the car to ask privilege to wash his hands; but it held the railroad company liable, because he was a passenger and this car was one of its train: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 417; 8 Am. St. Rep. 512, 538. See extended note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753.

The general rule of master and servant is, that the master is liable for the act of the servant, though willful and malicious, if done in the course of his employment within the scope of his authority. Had this unfortunate little boy been a passenger, the company would be liable for the act, for rea-

sons above stated, no matter whether the act was within the scope of the servant's authority or not; but not being a passenger, but a trespasser, having no contract with the company authorizing him to be where he was and binding the company for safe carriage and proper treatment, he falls under the above general rule.

Outside of the exception as to passengers, the employees of a railroad company may be divided into two classes. For the willful wrongs of one class, though done to even a trespasser, the company is liable, because the act is done in the course of their employment, and within the scope of their authority; whereas, for the same act done by a servant falling within the other class, it would not be liable. A company might be held liable for a trespass by a conductor to a trespasser on his train, but not for the same act of and by a clerk in the business office, or one of a body of repair-hands.

Now, there is no question with us that though this little boy was on the car without right, if he was forced or kicked off by an employee of the company acting in the course of his business and within his authority, that the company would be liable; for though a trespasser, he had not forfeited life or limb, and had the right due to one human being from another,—the right of exemption from brutal inhumanity, and not to have his hand, while holding to the car, kicked loose when the cars were moving, to the almost certain loss of life or limb.

Thus, then, it being the law that for this willful trespass the defendant would only be liable if the employee in doing the act was acting in the course of his business within the scope of his authority, look at answer to interrogatory 5, and it tells us that both the name and the business of the man who did this act were unknown. If, as several answers of the jury say, the man's name was unknown, it seems difficult to say how it could be known that he was a company employee, except from some evidence tending to show he had on blue clothes; but passing that, still, as his business is unknown, how could the jury say that he was acting in the course of that business, and within the scope of the authority conferred upon him, when that authority was unknown? Thus we have the certificate of the jury that a vital element necessary to the plaintiff's case was wanting; this certificate shows that the general verdict ought not to have been found, because an indispensable element to sustain it was wanting.

What, then, is the effect of this answer 5? Section 5, chapter 131, code of 1887, says, that "where any such separate verdict or special finding shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Before this statute allowing special questions to a jury, the essential matters of fact involved in a trial were wrapped up in the general verdict, and it could not be told whether each and all those essential facts were in fact, in the opinion of the jury, found for the party prevailing; and as the province of a court to set aside the verdict was narrow, the losing party could not have the benefit of a fact which the jury, had they passed separately on it, would have found for him. The Kansas court said: "The main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law correctly, and guard against any misapplication of the law by the jury. It is a matter of common knowledge that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, when at the same time it will find a certain fact to have been proved, which in law is an insuperable barrier to a recovery in accord with the general verdict. This does not imply intentional dishonesty of the jury, or a failure of the court to instruct correctly, but rather a disposition to jump at results on a general theory of right and wrong, instead of patiently grasping, arranging, and considering details. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists, without some sufficient evidence of its existence. Its response will, as a rule, be correct, if direct, and if not correct, then evasive and equivocal." This statute I regard as a salutary instrument to enable the parties to have the jury, as the triers of the facts under the evidence, to say what is their finding separately upon the controlling facts in the case. This statute, originating in New York in 1848, prevails in many Western states, all having the clause quoted above from our code.

In 2 Thompson on Trials it is stated that if such special findings are inconsistent with the general verdict, the latter falls, and they control, and that the judgment must be based on them. Such, indeed, is the command of our statute; and in *Kerr v. Lunsford*, 31 W. Va. 659, and *Wheeling Bridge Co. v. Wheeling etc. Bridge Co.*, 34 W. Va. 155, that construction is put upon our statute. "When a fact found in one or more

of the answers to interrogatories excludes every conclusion that will authorize a recovery for the plaintiff," it is inconsistent: Thompson on Trials, sec. 2691. Clearly, answer to interrogatory 5 is inconsistent with the general verdict, for that says that a fact indispensable to recovery could not be ascertained. The plaintiff had to prove, to recover, that the wrong was done, not simply by an employee, but by one in the course of his appointed business, and acting within the bounds of his authority in the act in question.

A question arises whether the obscurity and uncertainty as to the author of the wrong, if done, and his business relation to the company, is relieved by question No. 6, and its answer. The evidence tends to show that on the train were an engineer, fireman, and two brakemen, one of them being *ex officio* conductor, and a yard-master and assistant are suggested as perhaps the persons. Which one did it we are not told. The act would not fall within the authority of all, so far as appears. Then, again, what does the word "control," in the question, mean? Does it only mean that the person was some one working on the train, and therefore in control of it? or in the yard, and therefore in control? If it is to be held as meaning a person in a particular line of duty, — that line within which the act of expelling trespassers would fall, — then it would seem inconsistent with answer 5, which tells us that the business of the man who did it was unknown. I do not so construe it, but as simply meaning somebody connected with the railroad.

Plaintiff's instruction No. 1: "The jury are instructed that the defendant is liable for an injury brought about by the negligence or misconduct of its agents and employees acting within the scope of their employment, whether such negligence or misconduct is willful and intentional, or not willful and intentional."

Plaintiff's instruction No. 2: "The jury are instructed that if from all the facts and circumstances in this case they believe that the plaintiff, James Walter Bess, was, by threats or violence, or by force, driven from the train in question, when said train was moving, by some employee of the defendant, acting within the scope of his employment, that then the plaintiff is not required to prove the name or establish the identity of the employee."

These two instructions are good with the construction that the alleged wrongful act was one legitimately falling within

the scope of the employment of the employee who did the act, if any one did it; and that whilst it is not required to prove the name and identity of the person, yet he must be an employee, and his business relation to the company must be ascertained, so that it may be determined whether the act was within the scope of his business.

Judge Lucas is of opinion that answer to question No. 6 relieves the uncertainty of answer to question No. 5, and would affirm the judgment, while the other three members of the court would reverse it. Judge English and I would render judgment for the defendant because of the inconsistency of the answer to special question 5 with the general verdict; but judges Lucas and Holt would remand the cause for a new trial.

Therefore the judgment is reversed, the verdict and the six findings in answer to the six particular questions are set aside, and the cause is remanded to the circuit court for a new trial.

RAILROADS — DUTY WITH REGARD TO EJECTING TRESPASSERS. — A railroad company may eject a trespasser from its train at any point, but he must not be wantonly exposed to peril of serious personal injury: *Hardenbergh v. St. Paul etc. R'y Co.*, 39 Minn. 3; 12 Am. St. Rep. 610, and note. Removing a trespasser from a train while in motion, but moving very slowly, is not negligence or wantonness *per se*: *Southern Kansas R'y Co. v. Sanford*, 45 Kan. 372.

MASTER AND SERVANT — MASTER'S LIABILITY FOR WRONGFUL ACTS OF SERVANT. — When a servant performs a duty for which he is engaged in a wrongful manner, and to the injury of another, the master will be liable: *International etc. R'y Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902, and note; note to *McClung v. Dearborne*, 19 Am. St. Rep. 712. But a master is not liable in punitive damages for the tort of a servant, unless he authorized it: *Gulf etc. R'y Co. v. Reed*, 80 Tex. 362; 26 Am. St. Rep. 749, and note; note to *Savannah etc. R. R. Co. v. Bryan*, 22 Am. St. Rep. 465.

GILLINGHAM v. OHIO RIVER RAILROAD COMPANY.

[35 WEST VIRGINIA, 562.]

RAILROAD COMPANIES — DUTY TO PASSENGERS. — A common carrier of passengers by rail is bound to treat them properly and carry them safely, though not as an insurer, and must protect them against injury from the negligence or willful misconduct of its servants while performing the contract to carry, and from the negligence or willful wrong of their fellow-passengers or strangers, so far as practicable.

RAILROAD COMPANIES — FALSE IMPRISONMENT OF PASSENGER. — A common carrier of passengers by rail is liable in exemplary damages for the

arrest and false imprisonment of a passenger, without reasonable or probable cause, made, or caused to be made, by its conductor in charge of the train during the execution of the contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself.

Z. T. Vinson, for the appellant.

Gibson and Michie, for the appellee.

HOLT, J. This was an action of trespass on the case, brought on the fifteenth day of October, 1889, in the circuit court of Cabell County, by Elmer Gillingham against the Ohio River Railroad Company, averring, in substance, that at the station in the town of Huntington he was on defendant's passenger train with the proper ticket for Ben Lomond, a station on defendant's line, and that defendant, through its agent the conductor, unlawfully, falsely, maliciously, and without reasonably probable cause, caused plaintiff to be arrested, handcuffed, and led and driven in the daytime through the principal street of Huntington, a long distance, to the office of a justice, on an unfounded charge, before whom he was tried on the merits, found innocent, and discharged; all of which was done by defendant, to plaintiff's great mental anguish, humiliation, and distress, loss of time, inconvenience, and expense, to his damage, etc. Defendant appeared and demurred to the amended declaration, and the court overruled the demurrer, and thereupon defendant pleaded not guilty. The cause was tried by a jury, who brought in a verdict for one thousand dollars damages; defendant moved the court to set the same aside and award a new trial, and made various other motions, all which the court overruled and rendered judgment; and defendant brings the case here on writ of error.

On behalf of plaintiff, four witnesses were examined, himself, the officer who made the arrest, and W. A. Thornley and William Bell, who were present at the arrest and during the transactions which led to it. On behalf of defendant, one witness was examined, viz., the conductor of the passenger train who caused the arrest to be made.

The record sets out in full the evidence, not the facts proved; as to a large part of it, however, there is no substantial conflict, so that it can be safely said, for the present purpose, that the facts are as follows: —

The plaintiff, twenty-four years old, was a farmer living in

Ohio, nine miles from Gallipolis, but for a short time preceding the 17th of September, 1889, had been working for Thornley at a saw-mill in Cabell County, West Virginia. On that day he came into Huntington and bought a railway ticket from defendant for Greenbottom depot. He had an uncle living in Huntington, and before starting received a letter from home stating that his mother was sick; thereupon he decided to go on up to Ben Lomond station, and bought from defendant a ticket for that place. He then went back to the depot, some forty minutes before the schedule time for his train to start, Thornley being with him. The train was standing on the side-track, about thirty-five yards above the depot. It was raining very hard, and they walked across the track and got on a coach; but finding it locked, they stood on the platform until it was unlocked, when they went in and sat down in the smoking-car, as Thornley was smoking. The conductor and brakeman were on the train when the plaintiff got on. When Gillingham, the plaintiff, and Thornley got on the platform, they were followed onto it by one Coffey, a young man very perceptibly intoxicated at the time. Plaintiff was entirely sober, not having drank anything intoxicating that day, being orderly and well-behaved, as well as sober, making no disturbance of any kind during the whole transaction. But Coffey commenced kicking or pounding on the door, when the conductor went to the door, saw Coffey standing at the far side. Coffey looked and acted as if very drunk.

Therefore the conductor put his hand on Coffey's shoulder and said: "Young man, you ought not to go on the cars this way; you might get hurt or killed, and then I would be responsible for it." Coffey then put his hand down into his pocket and drew out an open knife, with a blade three or four inches long. The conductor stepped back into the car, picked up a coupling-pin, went to shut the door, when Coffey raised the knife a second time. The conductor hit him on the knuckles with the pin, and he, Coffey, threw the knife "down like." The conductor told him to get off the train or he would throw the pin at him, and picked it up for that purpose, but refrained, but at the depot sent the baggage-master for a police-officer. Witness Beatty, the policeman, came, when the conductor told him to arrest a man who was in the smoking-car, who he was afraid would do him some harm. The policeman, conductor, and another passed out of the baggage-car into the smoking-car, and there they found plaintiff, Gil-

lingham, seated, Thornley smoking, sitting behind him on the same seat with Coffey, Coffey having his head leaning on the back of plaintiff's seat. The conductor pointed out plaintiff, and directed the policeman to arrest him. The policeman asked the conductor, "Are you sure that is the man?" The conductor said he was, and that he had a knife. The policeman then ordered plaintiff to stand up and take out his knife, and the conductor came up and said he recognized the knife, and plaintiff handed it to policeman, and pointing to Coffey on the next seat behind, said: "It was not me, but that man." The policeman, raising Coffey's head off the seat, asked Coffey what was the matter with him. Thornley also then said Coffey was the man; and Beatty, the officer, thinking there must be something wrong, and that the conductor was mistaken, again asked him if plaintiff was the man, and the conductor told him he was sure he was the man, and to take him and hold him until he came back; then the policeman put handcuffs on plaintiff and started with him. Thornley went out on the platform, and again told them plaintiff was not the man. The policeman led plaintiff through the street, with the handcuffs on, first to his uncle's, James Gillingham's, and then to the office of the justice; and the conductor moved out with the train. The justice tried the case on the merits, acquitted the prisoner, and discharged him.

Plaintiff did not look like Coffey, in dress, size, or otherwise. Plaintiff was sober, quiet, and well-behaved. Defendant asked the conductor as its witness: "Was the act of your pointing out the man as the one who had committed the assault upon you a personal one." He answered: "It was personally done." He further said: "Plaintiff had done nothing that he knew of in violation of the rules of the defendant company, had done nothing against its property, and that he himself was off duty as conductor when the arrest was made, he thought; and that he honestly believed that plaintiff was the man who cut at him with the knife."

The defendant as a common carrier of passengers was bound to treat the plaintiff as one of its passengers respectfully, and carry him safely to Ben Lomond, the point his ticket called for. "Among the obligations which such contract imposes are, 'to protect the passenger against any injury from negligence or willful misconduct of its servants while performing the contract, and of his fellow-passengers and strangers, so far as practicable, to treat him respectfully, and to provide

him with the usual accommodations, and any information and facilities necessary for the full performance of the contract upon the part of the carrier.' And these obligations continue to rest upon the carrier, its servants and employees, while such contract continues and is in process of performance": *Dwinelle v. New York Central etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611 (1890), and cases cited.

In *Harris v. Nicholas*, 5 Munf. 483 (decided in 1817), it is stated that "an employer or master is, in general, not responsible for a willful and unauthorized trespass, committed by his agent, overseer, or servant."

But in *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116 (decided in 1851), it was held that the principal is bound by the false representations of the agent, though he neither authorize them nor was informed of them. In *Tracy v. Cloyd*, 10 W. Va. 19, Haymond, J., in delivering the opinion of the court, refers to the case of *Harris v. Nicholas*, 5 Munf. 483, cited above, and also to Judge Story's work on agency; but the point was not involved and not decided; and in *Harris v. Nicholas*, 5 Munf. 483, it was only held, that where the act of the servant or agent was neither authorized by his principal nor committed in the usual course of his duty as such, the master was not liable.

"The general maxim of the law, subject to only a few exceptions, is, that whatever a man *sui juris* may himself do, he may do by another; which is expressed by the maxim, *Qui facit per alium facit per se*": 1 Minor's Institutes, 225; 1 Bla. Com. 429. See editor's notes on this: 1 Hammond's Bla. Com. 719. See note 1 to section 451 of Greenough's edition of Story on Agency, who contends that it is service, and not agency, which makes the master liable for his servant's torts. However this may be, the modern doctrine is well settled, that "that which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious" (Cooley on Torts, 534), as well as those cases in which the servant has failed to perform, refused to perform, or has negligently performed, the duties due from the master to others in the conduct of such business; and the master is primarily liable to others for his own negligence in

employing servants who are wanting in the requisite care, skill, or prudence for the business intrusted to them, when, by the exercise of ordinary care, it would have been known; and in regard to passengers whom the carrier has bound itself to carry safely, whether such want of care, skill, and prudence could have been ascertained or not; for between the two, the carrier who has made the wrong possible, though innocent in other respects, must pay the damage or suffer the loss.

But what the servant thus does without authority must be done in the master's service, must be in the line or within the scope of his employment. Masters "are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them": Lord Kenyon, C. J., in *Ellis v. Turner*, 8 Term Rep. 531-533, as quoted in Bishop on Non-Contract Law, sec. 612.

"So when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages. As between the company and the passenger, the right of the latter to compensation is unquestionable": Cooley on Torts, 2d ed., 626, and cases cited. Why? Not because the company authorized it expressly or impliedly, but because it was the duty of the company to treat him properly and carry him safely. And it makes no difference what was the conductor's motive for doing the act,—how exclusively personal it may have been, or how foreign to the master's business, then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery: *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185; *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311; *Chicago etc. R. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33; *Wabash R'y Co. v. Savage*, 110 Ind. 156. See Thompson on Carriers of Passengers, notes to *Pendleton v. Kinsley*, p. 363. *Harris v. Louisville etc. R'y Co.*, 35 Fed. Rep. 116, was a case of false imprisonment. See case of *Corbitt v. Twenty-third St. R'y Co.*, 42 Hun, 587 (1886),—also a case of assault and false imprisonment.

Mecham, in his work on agency, section 740, gives the general rule as follows: "While, as has been seen, it is well set-

held that the principal is liable for the negligent act of his agent committed in the course of his employment, it has been held in many cases that he is not liable for the agent's willful or malicious act. In the language of Judge Cowen, which fairly states the doctrine of these cases, 'the dividing line is the willfulness of the act': *Wright v. Wilcox*, 19 Wend. 345; 32 Am. Dec. 507. "The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be, that the principal is responsible for the willful or malicious acts of the agent, if they are done in the course of his employment and within the scope of his authority; but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority; as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own": See cases cited.

Such seems to be the present modern doctrine as to passenger carriers, and founded upon public policy, if not upon the principle already stated.

"False imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere": Bishop on Non-Contract Law, sec. 206, and cases cited. "False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion." *Prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment": Cooley on Torts, 196.

"An abuse of a lawful arrest is also false imprisonment; as cruelly treating the arrested person, insulting him, imposing on him undue hardships": Bishop on Non-Contract Law, sec. 210. "In false imprisonment proper, as distinguished from malicious prosecution, malice is not required": Bishop on Non-Contract Law, sec. 212; but want of reasonable and probable cause is sufficient. "When the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person himself, it is a case of false imprisonment":

Bishop on Non-Contract Law, sec. 213. The mistake may be shown in mitigation of damages: See cases in note.

We have seen that it is the duty of the common carrier of passengers to treat his passengers properly and respectfully and to carry them safely, and though not an insurer, yet the law, based upon principles of public policy, is strict and exacting in requiring their performance; and surely in this day, when all the world is carried to and fro daily by instrumentalities vast in power and force, without constant vigilance, and great care and skill almost as dangerous as forceful, owned by mere corporate entities, public policy is not likely to exact any less stringent rule.

The carrier is not only bound to safely carry and properly treat the passenger, but, as far as may be, to keep an orderly and well-regulated house, for such in fact it is in these days, "protecting the passengers from the assaults of fellow-passengers or trespassers during the subsistence of the contract of transportation": *Pittsburgh etc. R'y Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; Thompson on Carriers of Passengers, 295, and notes. See also opinion of Shaw, C. J., in *Commonwealth v. Power*, 7 Met. 596-601; 41 Am. Dec. 465; citing *Markham v. Brown*, 8 N. H. 523; 31 Am. Dec. 209. And to enable the company to discharge these duties the more efficiently through its conductor, put as a living, intelligent person to act as its representative in the flesh for that purpose, our statute has enacted that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of such train": Code 1891, c. 146, sec. 81, p. 906; thus giving him, as conductor, the shield and protection, as well as the authority and power, of the state in keeping and enforcing law and order and protecting persons and property. This is a great thing for him, for his company, for his passengers, for the public at large; for him, not only because he can, in the discharge of his various and often perplexing duties, now speak and act with more confidence with the state at his back, but, as such conservator of the peace, may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. "If by him an arrest is made with reasonably probable cause for belief, he will be excused, even though it appear afterwards that in fact no offense had been committed": See Cooley on Torts, 202; for the corporate master and owner, not only for these reasons, but for the superadded one, that

its duties to its passengers, its servants, and the public can now be more efficiently performed through its living representative, put in charge for the purpose, and its widely extended property rendered more safe and secure; for the passengers, because their safety and well-being can be better guarded; and for the state, as interested in the preservation of law and order, as well as in all these things.

But there is nothing to indicate that it was the intent of the law-making power to slacken the vigilance or diminish the responsibility of the common carrier, or render it less liable for failure to discharge its duties than before.

Now, returning to the facts, — there is little or no conflict in the evidence, — and I have given them with some minuteness, and so far as the conductor details them, pretty much in his own language. We find that, as a matter of fact, he had taken charge of the train as such conductor, whether the thirty minutes had fully run out or not. He was on the train, acted and spoke as the one in charge, chided and cautioned Coffey for his drunkenness, had the doors opened, received passengers, and made ready to start; in the mean time sending a subordinate for the police-officer to make the arrest. In truth, it is said for his defendant company, if not by himself, as matter of complete exculpation of the master, that he was acting as a conservator of the peace under the statute, and therefore could not be acting in any other capacity. He could only be such conservator, as a superadded function to that of "conductor of a railroad train, while in charge of such train."

He caused to be arrested and handcuffed, and led through the streets of Huntington, in the open light of day, without any reasonable or probable cause, a sober, orderly, and well-behaved young man, on the train as a passenger, who, as he now says, as another ground of defense for his principal, had, in his own language, done nothing in violation of the rules of the Ohio River Railroad Company, done nothing against the property of the company, but had bought his ticket, was quietly seated on the train, waiting for it to carry him to Ben Lomond; and it was the duty of the defendant to cause that to be done safely and properly, as it had contracted to do, and it cannot escape liability by laying the fault on its servant.

In *Craker v. Chicago etc. R. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504, a suit for an assault committed by the conductor on a lady passenger, the same defense was made as is set up

here: that it was the unauthorized and purely personal act of the conductor, and not within the scope of his employment.

Ryan, C. J., in delivering the opinion, among other things, said: "And is the appellant here to contend that it has no responsibility for the flagrant violation of the contract which the respondent paid it to make and to keep by its sole present representative appointed to keep it on its behalf? Like the English crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant tortiously broke this contract as surely as it made it; committed this tort as surely as it made the contract." The willfulness of the servant's act is no excuse, so long as it amounts to a breach of the contract: *Weed v. Panama R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474; nor the fact that the act is wholly disconnected from his duties, and a purely wanton assault.

In *Milwaukee etc. R. R. Co. v. Finney*, 10 Wis. 388, the court held "that the proper rule was, that where the misconduct of the agent caused a breach of the obligation or contract of the principal, the principal would be liable, whether such conduct be willful or malicious, or merely negligent."

There are many other cases to the same effect, which need not be here cited; for here the wrong complained of was clearly in the line of service. It was done by the servant in those things that related to his duty under the master, and was not the "servant's independent tort, committed outside the sphere of his employment": See Bishop on Non-Contract Law, sec. 635.

Personal liberty is a natural right, "and *prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment": Cooley on Torts, 196.

In this case the innocence of the plaintiff is shown beyond all question, not only by a trial and acquittal, but by the same evidence given under oath by Thornley and others which was given by him and others without oath to and in the presence of the conductor and police-officer before and at the time they were making the arrest, now reinforced by the evidence of the conductor himself; and it must be remembered that Thornley had long known, and knew well, both plaintiff and Coffey, and was present with the two from the beginning of the difficulty between the conductor and Coffey

down to the time plaintiff was led away out of the car under arrest.

The conductor says he was so much excited that he could not use his ordinary prudence and carefulness, and thus made the mistake. That he did it by mistake, I think there can be no question. What motive could he have had to treat his passenger, Gillingham, in that way? None whatever, so far as this record discloses. But if he had listened at the time to those who knew, or had used ordinary care to examine for himself, or had taken the hint given him by the officer that he was acting rashly and making a grave mistake, none would have been made; he would soon have come to his senses. But from some cause he failed to do this, and his mistake was not innocent in the eyes of the law, and the arrest was made, without any reasonable or probable cause, of a passenger, whom it was the company's contract duty to carry safely to the destination mentioned in his ticket, for which very purpose, among others, he was put in charge of the train, so that the act, although in violation of his duty to the carrier as well as to the passenger, was clearly within the scope of his employment; and therefore the master is liable. The jury fixed the damages at one thousand dollars, and the trial court refused to disturb the finding.

But defendant, by its counsel, claims that the damages estimated should have been limited to the actual money loss sustained by plaintiff,—for loss of time and actual expenses incurred by him in consequence of his having been put off the train,—and that the jury should have been told that they could not give exemplary, vindictive, or punitive damages,—terms often used indifferently in describing these damages. The exigencies of the case in hand do not call for any critical examination of the subject. For that I refer to the full and able discussion of the subject by the late Judge Green in *Pegram v. Stortz*, 31 W. Va. 220, also published in 7 Am. & Eng. Ency. of Law, 448, under the head of "Exemplary Damages." "Exemplary damages is the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought": 7 Am. & Eng. Ency. of Law, 448. And in actions of tort, when gross fraud, malice, or oppression, or any wanton, willful, and deliberate disregard of the injured person's rights appears, the

jury are not bound to adhere, in computing it, to the determinable money loss or damages, but may give such damage as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct. It may be smart-money as to the defendant, provided it be not an excessive or unreasonable *solatium* to the plaintiff: Sedgwick on Damages, 8th ed., c. 11. In this case the plaintiff passenger, entitled to proper and respectful treatment, was surely entitled to exemplary damages for the great indignity and humiliation to which he was subjected in being arrested, handcuffed, and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and shutting his ears to those who knew, and both showed him and told him the real offender.

These were the main questions. Others, however, were raised and discussed, which should not be passed by. I need not give the amended declaration. It was in tort for false imprisonment and malicious prosecution, with the usual inducement of the circumstances, including the contract for transportation, and the demurrer was properly overruled.

The court, at the request of defendant, directed the jury to find in writing upon three particular questions of fact submitted to them under section 5, chapter 131, of the code. 1. "Was the arrest of Gillingham the result of an assault with a knife in the hands of one Coffey made upon Ebert (the conductor) while the train was upon the side-track, before backing down to the depot for departure?" To this the jury answered, Yes. This question was immaterial. If true, it was no bar. It constituted no complete defense, and therefore, not being inconsistent with the general verdict of guilty, it could not control the latter, and the court could not accordingly give a judgment on it.

Question No. 2 was the same in substance, under a slightly different form, and was answered in the same way, and was properly disregarded by the court in giving judgment, and for the same reason.

3. "Did Ebert (the conductor) have any authority from the defendant company to cause Gillingham's (the plaintiff's) arrest; and if so, how, when, and by what official of said company was Ebert authorized to cause said arrest?" The jury answered: "Yes; from the Ohio River Railroad Company"; not giving the name of any special official, or the manner or the time of conferring such special authority. As

we have already seen, no special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the willful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely. This special question, also, was therefore immaterial, and if it had been answered as to the special official with a "No" instead of a "Yes," it would still have been the duty of the court not to permit it to control the general verdict": *Kerr v. Lunsford*, 31 W. Va. 659; *Wheeling Bridge Co. v. Wheeling etc. Bridge Co.*, 34 W. Va. 155; and the discussion of the subject and authorities cited by Lucas, J., in delivering the opinion of the court; and *Peninsular etc. Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666.

Various exceptions were taken by defendant during the progress of the trial. One was permitting testimony to go to the jury of what occurred to the plaintiff after he was arrested and removed from the car. Plaintiff, as a witness, states, in substance, that the officer, Beatty, took plaintiff by way of Beatty's house to the office of Squire Taylor, where he was tried and acquitted. To that evidence I see no objection.

When the conductor was on the stand as a witness for defendant, counsel for defendant several times asked the witness for whom he was acting when he pointed plaintiff out to the police-officer as the one to arrest, and whether or not this was a personal matter between the witness and plaintiff; whether he was acting in his own behalf or in his official capacity; and, if any, what authority he had for arresting or causing plaintiff to be arrested; or whether he was then acting within the scope of his authority as conductor of that Ohio River train,—all of which the court for a while steadily refused to permit to be answered.

But the court, during the trial, did permit the witness to answer that there was no solicitation from any one to make the arrest, "only himself"; that his pointing out plaintiff, etc., "was personally done"; that he "was off duty at the time the arrest was made"; "that he honestly believed that Gillingham was the man that cut at him with the knife when he pointed him out to the policeman."

These questions and answers were permitted to go to the jury, being substantially answers to the questions before ruled

out, so that we need not, at this point at least, consider these exceptions further.

Two instructions were given on motion of plaintiff,—No. 1 and No. 2. Seven were asked for by defendant; No. 1, No. 2, and No. 4 were given, and No. 3, No. 5, No. 6, and No. 7 were refused. Instructions given on motion of plaintiff were as follows:—

“No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff, without just cause, was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train or by the policeman, Beatty, by order of the said conductor, that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant.

“No. 2. The court instructs the jury that if they find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the expense and loss of time, if any, incurred by the plaintiff; also the bodily and mental pain and anguish resulting from the defendant's acts as proved; and for the outrage and indignity and humiliation put upon the plaintiff to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for.”

Instructions on behalf of defendant granted by the court are as follows:—

“No. 1. The court instructs the jury that the plaintiff cannot recover in this case, unless the acts done by Ebert in causing the arrest of the plaintiff were within the scope of his employment by the defendant railroad company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant railroad company.

“No. 2. The court further instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the railroad company, or at the place where his duties called him to be. There must be something more,—something which he was authorized by the defendant company to do, or which he did do while acting as such conductor, in the scope of his duties and employment.”

“No. 4. That unless the act done by the conductor in

causing the arrest of the plaintiff was authorized by the railroad company, or was properly and legitimately within the scope of his employment, you must find for the defendant."

Instructions asked for by the defendant, but refused by the court, were as follows:—

"No. 3. The fact that Ebert was employed by the defendant as a conductor of the passenger train upon which the plaintiff intended traveling is not sufficient evidence that he was authorized or employed to do the acts complained of; nor is that fact of itself sufficient to make the defendant liable for the acts complained of."

"No. 5. That if you believe from the evidence in this case that Ebert caused the arrest of the plaintiff while acting for himself, and upon his own authority, for his own personal safety, without any direction or authority from the railroad company for so doing, you must find for the defendant."

"No. 6. The court instructs the jury that it was not lawful for the policeman to make the arrest without a warrant therefor, and that the defendant railroad company could not have legally procured the plaintiff's arrest in the manner in which said arrest was made, and that the defendant is not liable for the acts of Ebert which said company itself could not have lawfully done."

"No. 7. The court instructs the jury that if they believe from the evidence in this cause that the plaintiff is entitled to recover anything, then, in estimating the damages, you are limited to the actual damage sustained by plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off the train, and you cannot in this case give exemplary, vindictive, or punitive damages."

I can see no objection to the instructions No. 1 and No. 2 given on behalf of plaintiff, if read in connection with No. 1, No. 2, and No. 4 given on behalf of defendant, of which there is no complaint. They are in harmony with, and substantially propound, the law, as we think, correctly. Plaintiff's No. 2 was approved in *Ricketts v. Chesapeake etc. R'y Co.*, 33 W. Va. 433; 25 Am. St. Rep. 901. It means that if plaintiff was a passenger on defendant's train, and during the time he was on the train to be carried to his proper station on the road, he was arrested or caused to be arrested without just cause by the conductor in charge of the train, and that such act was within the scope of the conductor's employment, then such arrest would be the act of the defendant; that is, an act

for which it might be liable. No serious objection can be made to instruction No. 2 given for plaintiff. It is drawn on the theory of exemplary damages as a *solatium*, — damages restricted to what would, in the opinion of the jury, be a fair and just compensation for the injuries sustained or inflicted: *Pegram v. Stortz*, 31 W. Va, 220.

Instruction No. 3 of defendant was virtually given in giving defendant's instructions No. 1, No. 2, and No. 4, so that, whether right or wrong, defendant has no ground of complaint in its refusal.

The same may be said of instruction No. 5 asked by defendant. It had already been given, and no complaint in this court is made by plaintiff.

Defendant's instruction No. 5, taken as a whole, is not correct, for if the arrest could not lawfully be made or caused to be made by the conductor without a warrant, that might add to the wrong, but would not relieve the defendant from liability for the false and groundless imprisonment of a passenger by the conductor in charge of the train, acting within the scope of his employment.

The refusal of defendant's instruction No. 7 has already been disposed of by what has been said on the subject of damages and in discussing plaintiff's instruction No. 2. In conclusion, we see no reason why we should set aside the judgment and verdict, and award a new trial. The judgment complained of is affirmed.

RAILROADS — DUTY TO PROTECT PASSENGERS. — One of the duties that a carrier assumes is that of protecting its passengers from injury caused by the willful misconduct of its servants or of their fellow-passengers or strangers: *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note; extended note to *Rommel v. Schambacher*, 6 Am. St. Rep. 784; note to *Chicago etc. R. R. Co. v. Flewman*, 42 Am. Rep. 36; note to *Hoffman v. New York etc. R. R. Co.*, 41 Am. Rep. 340; note to *Weeks v. New York etc. R. R. Co.*, 28 Am. Rep. 112. Though there is a breach of duty by the conductor of a railroad train towards a passenger, yet, in the absence of willful wrong or reckless disregard of a passenger's rights, mere abruptness of words or manner is not an insult which justifies the infliction of punitive damages on the company: *Mississippi etc. R. R. Co. v. Gill*, 66 Miss. 39; see *Harrold v. Winona etc. R. R. Co.*, 47 Minn. 17, — a case of assault by a conductor upon a passenger while boarding a train.

RAILROADS — LIABILITY OF, FOR ARREST OF PASSENGERS BY SERVANTS: See *Mulligan v. New York etc. R'y Co.*, 129 N. Y. 506; 26 Am. St. Rep. 532, and note with cases on that subject collected.

GREEN v. CAMPBELL.

[35 WEST VIRGINIA, 698.]

PARENT AND CHILD—CUSTODY OF CHILD. — The father is the natural guardian of his infant children, and in the absence of good and sufficient cause, is entitled to their custody, care, and education.

PARENT AND CHILD—CUSTODY OF CHILD. — When a child is not in the custody of its father, and he is seeking to recover it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if it is of years of discretion; and if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody.

PARENT AND CHILD—HABEAS CORPUS. — The writ of *habeas corpus* is the proper remedy to ascertain and enforce the proper custody of an infant; and when so used, the writ is of an equitable nature. The welfare of the child is the controlling element by which the court is to be guided in the exercise of its discretion.

PARENT AND CHILD—HABEAS CORPUS—DISCRETION OF COURT. — When the writ of *habeas corpus* is invoked to obtain the custody of an infant; the court is in no case bound to deliver it into the custody of any claimant, but may leave it in such custody as the welfare of the child at the time appears to require.

PARENT AND CHILD—CUSTODY OF CHILD. — The court, in ascertaining and enforcing the proper custody of an infant, will not establish a permanent custody, but one intended to continue until a change of circumstances shall, in respect to the infant's welfare, require a change of custody, or until the infant has reached the age when he may legally nominate his own guardian.

PARENT AND CHILD—TRANSFER OF CUSTODY OF CHILD BY FATHER. — The custody and control of an infant will not be restored to the father when he has transferred such custody to another by agreement, to the manifest welfare of the child, unless he is able to show that such change of custody will materially promote its moral and physical welfare.

J. W. Harris, for the appellant.

J. Osborn, for the appellee.

HOLT, J. This was a writ of *habeas corpus* sued out of the circuit court of Monroe County on the eighteenth day of August, 1890, on petition of Robert Green, the father, against James A. Campbell, the grandfather, to compel the latter to give up to the father the custody of Green's infant son, Thomas Campbell Green, then three and a half years old, as unlawfully detained by the grandfather. The circuit court, having heard the evidence of witnesses and the argument of counsel, was of opinion that the infant was not unlawfully detained by the grandfather, but on the contrary, that he was entitled to the custody and control of the infant; and

from this decision Green, the father, has brought the case here by appeal.

The facts are as follows: Robert Green, the plaintiff, married the daughter of James A. Campbell, the defendant. Thomas Campbell Green, the infant, the right to whose custody is the matter here in dispute, is now three and a half years old. His mother died when he was sixteen months old, when he was committed by his father to the care and custody of his grandmother and grandfather, the defendant, who have raised, supported, and had the sole care and custody of the child from that day to this. Campbell, the grandfather, and his wife are sober and industrious, of high moral character, Campbell owning considerable property, including a farm on which he lives, in the county of Monroe, and is well able to take care of the child according to its condition in life. Both these grandparents are devoted to the child, and the child devoted to them, and they have no living children of their own, except a son over twenty-one years of age, a young man well raised and of high moral character. Thus far the grandparents have provided everything for the comfort and well-being of the child, as they are well able to do. Robert Green, the father, is thirty-two years old, sober, industrious, of high character, good family, and capable of providing for and raising his child according to its station in life, is warmly attached to it, and it to him. At the death of his first wife he was living in the same house with his father-in-law, and cultivating a part of Campbell's farm as his tenant. He married a second wife in May, 1890, about twenty-two years of age, who has no children as yet, and who desires to have this child with her and to care for it, it being her husband's only child. He owns a farm about three miles from Campbell's, on which he now lives with his second wife, of what kind or of what value we are not informed. Thus far there is no controversy about the facts.

The grandparents of the child claim and testify that, upon the death of the mother, Green's first wife and their daughter, Green relinquished the child to their care and custody, with the express understanding and upon the express condition that it was not after a while to be taken away from them; that Green assented, with the understanding that he was to see his child and take him around with him sometimes, to which Campbell and wife agreed, saying that if anything should happen to them, so that they would not be able to take

care of the child, they should expect Green then to take the child and care for it; that Green assented, and upon these terms and conditions they took the child, and have thus far kept and cared for it, as already stated. Campbell and wife are borne out in their statement by another witness. In fact, Green does not deny what was said and done, but claims that what he meant was, that they were to keep the child, but only until such time as he might be in a position to have it properly cared for himself, being then unmarried and without a family.

Mrs. Campbell, the grandmother, during this conversation about keeping the child, told Mr. Green that "she had seen some old people have trouble enough in taking children to raise, and then having to give them up, and that she did not intend to be treated in that way." Green does not deny this, and it is a very strong circumstance tending to confirm their understanding of what took place.

"The father of the minor, if living, and in the case of his death, the mother, if fit for the trust, shall be entitled to the custody of the person of the minor, and to the care of his education": See sec. 7, c. 82, Code 1891. But "the right of the father or mother to the custody of their minor child is not an absolute right to be accorded to them under all circumstances, for it may be denied to either of them, if it appears to the court that the parent, otherwise entitled to this right, is unfit for the trust": *State v. Reuff*, 29 W. Va. 751; 6 Am. St. Rep. 676. The father is the natural guardian of his infant children, and in the absence of good and sufficient cause, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care, and education: *Rust v. Vanvacter*, 9 W. Va. 600; *State v. Reuff*, 29 W. Va. 751; 6 Am. St. Rep. 676.

Where the father has not the custody of the child, and is seeking to recover it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody: *Armstrong v. Stone*, 9 Gratt. 102, 107.

The courts of equity of this state, in granting divorces, may decree as it shall deem expedient concerning the care, custody, and maintenance of the minor children, and may revise or alter such decree as the circumstances of the parents and

the benefit of the children may require: See sec. 11, c. 64, Code 1891, p. 614, showing the discretion given the court in that class of cases; but that such discretion is to be guided by considering what will be of benefit to the children rather than by any legal right of the parent; and such is the manifest tendency of the modern doctrine on the subject.

This writ, with so memorable a history, and now so highly prized among English-speaking people everywhere, designed and admirably adapted to secure individual freedom, without which a vital part of the great charter itself might have been but a solemn asseveration of abstract right, has come to be applied to other uses, and among them, to the ascertainment and enforcement of the right of custody of infant children: *Mathews v. Wade*, 2 W. Va. 464. But it is not to be forgotten or overlooked that such use of this writ is of an equitable nature, and therefore the welfare of the infant is the polar star by which the court is to be guided in the exercise of its discretion; and the court, when asked to restore, is not bound by any mere legal right of parent or guardian, but is to give it due weight as a claim founded on human nature, and generally equitable and just: *Armstrong v. Stone*, 9 Gratt. 102-107; Church on Habeas Corpus, secs. 440-442.

"The court is in no case bound to deliver the child into the custody of any claimant or of any other person, but may leave it in such custody as the welfare of the child at the time appears to require": Hurd on Habeas Corpus, 2d ed., 461. The court does not establish a permanent custody, but one intended to continue until a change of circumstances shall, in respect of the infant's welfare, require a change of custody, or until the infant has reached the age of fourteen years, when, by statute, he may nominate his own guardian, subject to the parent's right and to confirmation by the court: Code, sec. 4, c. 82, p. 673.

Looking at the question before the court in this light, and applying these principles, there are some reasons why the father should not have asked for what he is here seeking, and still more why the court should not grant it. These I shall endeavor to give briefly in the language of the facts of the case, for there really can be no serious controversy about the only material disputed point, which is not the turning-point, in my view, in any event.

How could Robert Green, the plaintiff, have misunderstood the meaning and intent of the mother of his dead wife, when

she told him in advance, and as a condition of her taking this infant, then sixteen months old, to raise it, she did so with the express understanding that it was not to be given up to him, only in the unexpected and improbable contingency named by her, and was not to be taken from her and her husband after they had had the trouble of raising it, when, as the child of their old age, they had become more attached to it than to any child of their own? Plaintiff handed her the child, and she took it. To say that this was not his agreement because he did not in so many words assent to it is a little like a man denying his bond because when he delivered it he kept silent and said nothing. On this branch of the case, see *Coffes v. Black*, 82 Va. 567; *Merritt v. Swimley*, 82 Va. 433; 8 Am. St. Rep. 115; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Chapsky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321, and editor's note citing and commenting on the following cases, among others: *Verser v. Ford*, 37 Ark. 27; *Lyons v. Blenkin*, Jacob, 245; *United States v. Green*, 8 Mason, 482; *Wilcox v. Wilcox*, 14 N. Y. 575; *Matter of Waldron*, 13 Johns. 417; *Pool v. Gott*, 14 Law Rep. 269; *Dumain v. Gwynne*, 10 Allen, 270; *State v. Libbey*, 44 N. H. 321; 82 Am. Dec. 223; qualifying *State v. Richardson*, 40 N. H. 272. See also *In re Scarritt*, 76 Mo. 565; 43 Am. Rep. 768, and note; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177, and note. In this last case Mr. Freeman sums up what he deems the weight of American authority on this point as follows: "A father can, by agreement, surrender the custody of his infant child to another, so as to make the custody of that other legal." To the same effect, see Hurd on Habeas Corpus, 528; Tyler on Infants, 283.

1. The father during his lifetime, and after his death the mother, is entitled to the custody of the person of their infant child, because, by the law of nature, it is theirs to care for and bring up, and this right is recognized and enforced by our statute.

2. But such right is not absolute, for the welfare of the infant may require the court, in the exercise of its sound discretion, to leave or intrust the custody to another.

3. The feelings and rights of one whom the father has put in the place of parent, and between whom and the child such relation has created mutual affection, are not to be subject to the whim and caprice of the father, but unless it appears that the best interests of the child imperiously demand it, the court,

in dealing with relations so delicate, so easily set ajar irreparably, will follow the discreet course of letting well enough alone.

4. And to enable them to do this, the writ applied to this class of cases is of an equitable nature, and we should turn our back at once upon this qualified estoppel, if the infant's moral or physical welfare clearly pointed another way.

In this case it does not, but on the contrary, plainly leads us in a direction which does not involve any breach of faith on the part of the father. This little boy, now nearly five years old, is himself, no doubt, attached to his grandmother, — he has known no other mother; to his grandfather; to his grown-up uncle; to the quiet, sober old homestead with its abounding comforts and plenty. Human nature and human experience are parts of the common law; there is no need that this child should speak. Can the plaintiff take him to a better home, — to one as good, for his present moral training and his physical comfort, present and to come, for some years, at least? What fact appears in this record that should induce us to drag him away to the home of a stranger, of a young married woman, good and amiable, in every way worthy of high esteem, but none the less a stranger, the mistress of a strange home, and likely, in the-course of nature, soon to have about her those dearer to her than her own self? Plaintiff does not say that this new home of his is a better one for this child. He does not pretend to tell us why, or show us how, it is a better home than the present one, or that he is more able, or as able, to supply him in his tender years with what he needs, as he is now supplied with and sure to receive, for some years, at least. All he pretends to say, and that is a great deal, and very much to his credit as a man, is, that he is extremely fond of his child. But this great fondness has in this instance blinded his better judgment, as, in all likelihood, he would to his sorrow have learned, when too late to restore his child to that comfortable and appropriate home which he, by fair agreement, provided for him on the death of his first wife; and he will himself hereafter see, as others now foresee, that it is discreet, and not at variance with true as contrasted with capricious fondness, to leave his little boy where we find him. Therefore the judgment of the learned judge, who saw these parties face to face, and heard them testify, should be and is affirmed.

PARENT AND CHILD — CUSTODY OF MINOR CHILD. — The father, if a fit and suitable person, is generally entitled to the custody of an infant child: *Merritt v. Swinley*, 82 Va. 433; 3 Am. St. Rep. 115; *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48, and note; *Umlauf v. Umlauf*, 128 Ill. 378. The ordinary cannot appoint a guardian of a minor child whose father is living: *Friesner v. Symonds*, 46 N. J. Eq. 521; see *Ingalls v. Campbell*, 18 Or. 461.

PARENT AND CHILD — CUSTODY OF CHILD — ITS WISHES, WHETHER CONSULTED. — When resolving the question as to what will best subserve the interest and happiness of a minor child, its own choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment: *Richards v. Collins*, 45 N. J. Eq. 283; 14 Am. St. Rep. 726, and note; *Merritt v. Swinley*, 82 Va. 433; 3 Am. St. Rep. 115, and note.

PARENT AND CHILD. — HABEAS CORPUS TO OBTAIN CUSTODY OF CHILD: See note to *Brooke v. Logan*, 2 Am. St. Rep. 186; extended note to *Chipsky v. Wood*, 40 Am. Rep. 327; extended note to *State v. Smith*, 20 Am. Dec. 330.

PARENT AND CHILD — CUSTODY OF MINOR CHILDREN. — The custody of a minor child in divorce cases is a question of the welfare of the child, and it will be awarded to the parent most fit and better able to care for it: *Kentler v. Kentler*, 3 Wash. 166; 28 Am. St. Rep. 21, and note; *Haymond v. Haymond*, 74 Tex. 414.

PARENT AND CHILD — TRANSFER OF CUSTODY OF CHILD BY PARENT. — A parent is not estopped from reclaiming the custody of a child, where he places it in the care and keeping of another, verbally agreeing that the latter might have its custody during minority: *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177, and note; *Ex parte Clark*, 87 Cal. 638. A father cannot, except in cases of adoption or apprenticeship, make an irrevocable contract for the custody of his minor child: *Weir v. Marley*, 99 Mo. 484.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

RENIER v. HURLBUT.

[81 WISCONSIN, 24.]

JURISDICTION TO RENDER PERSONAL JUDGMENT cannot be obtained against a defendant who does not reside and is not within the state, and upon whom process is not served except by the publication thereof.

GARNISHMENT OF A JUDGMENT in a state in which neither the judgment creditor nor debtor resides, and wherein the judgment was not rendered, effected by the service of process upon the agent of the debtor within the state, is void, when the cause of action upon which the garnishment was founded did not originate in the state where the action was commenced, and such action was not to enforce any contract entered into with reference to any subject-matter within that state.

GARNISHMENT OF JUDGMENT. — **THE SITUS OF A JUDGMENT** for the purpose of garnishing it is only in the state wherein the judgment creditor resides; and where the debtor is an insurance corporation, the garnishment of it in another state in which it does not reside, upon service on one of its local agents in that state, is void.

ACTION against the defendants as sureties on an undertaking on appeal from a judgment in favor of the plaintiff and against the Dwelling House Insurance Company, a corporation organized and having its place of business in Boston, Massachusetts. The defense relied upon was, that after the affirmance of the judgment appealed from, the St. Paul Fire and Marine Insurance Company, a Minnesota corporation, had commenced an action against the plaintiff in the superior court of Cook County, Illinois, in which service of process had been made by publication, and a garnishment of the judgment in favor of the plaintiff had been effected by the service of garnishment process in Illinois upon the agent of the Massachusetts company residing in the state wherein he was served.

The trial court found the garnishment of the judgment valid, and that the plaintiff was not entitled to recover.

George G. Greene, for the appellant.

H. W. Chynoweth, for the respondents.

CASSODAY, J. During all the times mentioned in the foregoing statement, the plaintiff, Mrs. Renier, was domiciled in and a resident of this state. The St. Paul company mentioned, claiming to be a creditor of hers for a large amount, commenced an action against her, not in any of the courts of Wisconsin, but in the superior court for Cook County, Illinois, and garnished the Boston company, as a foreign corporation, by serving garnishee process upon its agent located at Chicago. Mrs. Renier did not appear in that action, nor in such garnishee proceedings, and no process or notice of any kind was ever served upon her therein, otherwise than by publication, as mentioned. It is claimed that such publication was insufficient, but for the purpose of this appeal it is assumed that the statutes of Illinois were in all respects complied with. Upon the facts stated, the law is well settled by the supreme court of the United States, to the effect that the Chicago court obtained no jurisdiction to render any personal judgment against Mrs. Renier: *St. Clair v. Cox*, 106 U. S. 350; *Pennoyer v. Neff*, 95 U. S. 714; *Thompson v. Whitman*, 18 Wall. 457; *Board of Public Works v. Columbia College*, 17 Wall. 521. To the same effect are the decisions of this court: *Witt v. Meyer*, 69 Wis. 595; *Smith v. Grady*, 68 Wis. 215. This being so, it is very obvious that the most that could be accomplished in the Chicago court was to reach property, assets, or credits belonging to Mrs. Renier, and within the jurisdiction of that court. This is apparent from the authorities cited. If there was, therefore, a want of jurisdiction in that court as to such property, assets, or credits, then the proceedings therein were null and void, and could not operate to abate or defeat the suit at bar.

The question recurs whether, at the time of such garnishment, Mrs. Renier was the owner of any property, assets, or credits within such jurisdiction of the Chicago court. There is no pretense that at the time the garnishee papers were served upon the Chicago agent of the Boston company he had in his possession or under his control any tangible property belonging to Mrs. Renier. The extent of the claim is, that at

that time the Boston company was indebted to Mrs. Renier upon the judgment recovered in the circuit court for Brown County, mentioned in the foregoing statement, and hence that such indebtedness was attached or reached by the service of the garnishee papers upon the Boston company's agent in Chicago. If such contention can be maintained, then it is obvious that the St. Paul company might have attached such indebtedness by such garnishee proceedings in any state or city in the Union where the Boston company happened to have an office and an agent. This would necessarily be upon the theory that such indebtedness to Mrs. Renier was ambulatory, following each of the several agents of the Boston company, and, for the purposes of garnishment, having a *situs* with and in the office of each and all of such agents, wherever they happened to be located. If such is the law, it is certainly important that all should know it.

As indicated, none of the parties to the proceedings in the Chicago court were residents of Illinois. Proceedings by garnishment are, in their nature, very much like the old trustee process. In such a case in Massachusetts, at an early day, the court refused to take jurisdiction, for the reason that all the parties were non-residents: *Tingley v. Bateman*, 10 Mass. 346. It was there said, in behalf of the court, that "the summoning of a trustee is like a process *in rem*. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered, for this purpose, as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights in this respect are not to be considered as following the person of the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides." To the same effect are *Sawyer v. Thompson*, 24 N. H. 510; *Bowen v. Pope*, 125 Ill. 28; 8 Am. St. Rep. 330. It has also been repeatedly held in Massachusetts that a trustee residing in another state, though temporarily therein when service is made upon him, is not liable to the trustee process, and especially is this so where the principal defendant is also a non-resident: *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Nye v. Liscombe*, 21 Pick. 263. To the same effect are *Lawrence v. Smith*, 45 N. H. 533; 86 Am. Dec. 183;

Green v. Farmers' & C. Bank, 25 Conn. 452; *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630. The only exception to this rule seems to be where tangible property belonging to the principal defendant has been actually seized within the state, or the contract or promise is to be performed within the state: *Ibid.*; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Ross*, 31 N. H. 201; *Lawrence v. Smith*, 45 N. H. 533; 86 Am. Dec. 183; *Guillander v. Howell*, 35 N. Y. 657; *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630. Some of the authorities cited and the views thus expressed were considered and sustained by Mr. Justice Orton in *Commercial Nat. Bank v. Chicago etc. R'y Co.*, 45 Wis. 172.

The courts of Massachusetts have gone to the extent of holding that a resident of that state, having contracted to deliver goods at a place in another state, could not be charged in foreign attachment as the trustee of the person to whom the goods were thus contracted: *Clark v. Brewer*, 6 Gray, 320. In *Danforth v. Penny*, 3 Met. 564, it was held that a foreign corporation, having no specific articles of property in its possession within that state belonging to the principal defendant to whom it was indebted, could not be charged by trustee process, notwithstanding many of its members and officers resided there, and its books and records were kept there. To the same effect is *Gold v. Housatonic R. R. Co.*, 1 Gray, 424, where it was held that a foreign railroad corporation could not be charged by the trustee process, although in possession of a railroad in Massachusetts under leases from the proprietors thereof; and also *Towle v. Wilder*, 57 Vt. 622; *Louisville & N. R. R. Co. v. Dooley*, 78 Ala. 524; *Alabama G. S. R. R. Co. v. Chumbey*, 92 Ala. 317; *Western R. R. Co. v. Thornton*, 60 Ga. 300; *Bates v. Chicago etc. R. R. Co.*, 60 Wis. 296; 50 Am. Rep. 369; *Sutherland v. Second Nat. Bank*, 78 Ky. 250. In *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336, it was held that the courts of Massachusetts would not entertain jurisdiction of a bill in equity, brought by a citizen of Alabama against such foreign insurance corporation, to restore him to his rights under a life policy, notwithstanding such foreign corporation transacted business therein, and had a resident agent therein, upon whom all lawful process against the company might be served. The theory upon which foreign attachments and foreign garnishments are sustained is, that the principal defendant is beyond the reach of process, but that his property is

within the reach of such process, and may therefore be seized thereon: *Pennsylvania R. R. Co. v. Pennock*, 51 Pa. St. 244.

As indicated, the proceedings in the Chicago court were not based upon any cause of action originating in the state of Illinois, nor to enforce any contract or engagement entered into with reference to any subject-matter within that state, but merely for the purpose of reaching property belonging to Mrs. Renier, having no tangible existence in that state. The authorities cited, as well as others which might be cited, pretty clearly show that the Chicago court obtained no jurisdiction over that property: *Central R. R. & B. Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339; *Brauser v. New England F. Ins. Co.*, 21 Wis. 506. Nor was it the purpose of such proceedings to reach property belonging to the Boston company. Its indebtedness to Mrs. Renier was in no sense its property,—but rather an indication of the absence of its property. In speaking of the *situs* of choses in action for the purposes of taxation, Mr. Justice Field observed that “to call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due”: *State Tax on Foreign-held Bonds*, 15 Wall. 320. This principle has received recent sanction in this court: *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 325.

It is obvious from what has been said, that if the indebtedness of the Boston company to Mrs. Renier had any *situs* outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts; certainly not with the respective agents of that company, wherever located in the several states. But, as observed, that indebtedness was in the form of a judgment recovered by Mrs. Renier in a court of her domicile in Wisconsin. The statute of this state required the Boston company to pay that judgment to Mrs. Renier within the time therein specified: Rev. Stats., sec. 1974. Such payment, or its equivalent, was absolutely essential to the continuance of business in the state: Rev. Stats., sec. 1974. Such being the rules of law, and the facts being as stated, we must hold that the *situs* of the indebtedness in question for the purposes of garnishment at the time of the commencement of the proceedings in the Chicago court was only in Wisconsin, where Mrs. Renier resided. This view

is sustained by numerous cases cited by counsel for the plaintiff, among which are *Wallace v. McConnell*, 13 Pet. 136; *Rio Grande R. R. Co. v. Gomila*, 132 U. S. 485; *American Bank v. Rollins*, 99 Mass. 313; *Trowbridge v. Means*, 5 Ark. 135; 39 Am. Dec. 368; *Shinn v. Zimmerman*, 23 N. J. L. 150; 55 Am. Dec. 260; *American Bank v. Snow*, 9 R. I. 11; 98 Am. Dec. 364; *Wood v. Lake*, 13 Wis. 84. It follows that the proceedings in the Chicago court did not operate as a bar or abatement of this action.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiff and against the defendants for the proper amount remaining due and unpaid on the former judgment, with interest and costs.

JURISDICTION OVER THE PERSON, HOW ACQUIRED. — Personal service cannot be dispensed with, except in cases distinctly provided for by statute: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560. In actions *in personam*, strictly judicial in their character, and proceeding according to the course of the common law, service of the summons by publication upon resident defendants is not due process of law: *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547. But if a resident is temporarily absent, service by publication confers jurisdiction: *Fernandez v. Cusey*, 77 Tex. 452; provided there is an attachment upon property within the state: *Scott v. Streepy*, 73 Tex. 547; and that attachment does not fail: *Hochstadler v. Sam*, 73 Tex. 315. In *York v. State*, 73 Tex. 651, it was held that an appearance by a non-resident served with citation outside of the state, even though such appearance be expressly declared to be limited to the sole purpose of urging a plea to the jurisdiction of the court over his person, is a waiver of his immunity from the jurisdiction of the courts of the state by reason of his non-residence. A service of summons out of the state can be made, if at all, only when a publication of the summons has been ordered; and a prior service out of the state is of no avail: *McBlain v. McBlain*, 77 Cal. 507. See further, as to service by publication, the notes to *Williams v. Wescott*, 14 Am. St. Rep. 296, and *Shepherd v. Ware*, 24 Am. St. Rep. 217.

GARNISHMENT OF JUDGMENTS: See *Burks v. Hance*, 76 Tex. 76; 18 Am. St. Rep. 28, and note. When a judgment which has been garnished is reversed on appeal, and the plaintiff recovers another and final judgment against the defendant, the latter judgment is not affected by the garnishment: *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389.

JURISDICTION AS DEPENDENT UPON SITUS OF PROPERTY: See *Young v. South T. Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752 (corporate stock); *Bowen v. Pope*, 125 Ill. 28; 8 Am. St. Rep. 330 (promissory notes).

BRITTON v. GREEN BAY AND FORT HOWARD WATER WORKS COMPANY.

[81 WISCONSIN, 48.]

WATER COMPANY'S LIABILITY TO CITIZENS. — MUNICIPAL ORDINANCE, BY WHICH A WATER COMPANY IS REQUIRED TO SUPPLY the city and the inhabitants thereof with water for private and public uses, for private and public consumption, and for putting out fires, does not create contract relations between such company and the inhabitants of the city as individuals to supply them, and for their use, water for public purposes and consumption and for the putting out of fires.

WATER COMPANY — LIABILITY OF, FOR FAILURE TO FURNISH WATER TO PUT OUT FIRES. — A water company which accepts an ordinance of a municipal corporation granting it the use of the public streets and grounds in which to maintain mains, hydrants, and other structures of water-works, and to charge and collect rates for furnishing water to the inhabitants of the city for private use, and which requires the company to supply water for putting out fires and for other public and private uses, does not become liable to suit by a private citizen for damages sustained by him in the destruction of his property by fire, owing to the negligence of the company in not furnishing water to its mains and hydrants in quantities sufficient to extinguish fire.

ACTION to recover damages for the destruction of property by fire. The plaintiff's complaint being demurred to, he moved to strike out and overrule such demurrer, which motion being denied, he appealed.

Greene and Vroman, and George G. Greene, for the appellant.

Arthur C. Neville, F. C. Winkler, and E. H. Ellis, for the respondent.

ORTON, J. The demurrer to the complaint, on the ground that it did not state a cause of action, was sustained, and this appeal is from said order. The material facts stated in the complaint are substantially as follows:—

The water-works of the respondent company in the city of Green Bay were completed in 1887. Water-mains were laid throughout the city, and 160 double-nozzled hydrants thereon were located at different points, and one of them in the vicinity of the property of the plaintiff hereinafter mentioned. The mains and hydrants were connected with two direct-pressure pumping-engines as the power to furnish water for fire purposes, and of sufficient capacity, and that could be used singly or together, and supplied by four first-class boilers. The property of the plaintiff in such vicinity of the mains and hydrants consisted of certain lots, on which were mills,

cooper-shops, sheds, and other structures, and certain personal property therein, such as staves, heading, and other materials and things, all of great value.

In November, 1890, a fire broke out in one of said sheds, and gradually spread until all of the sheds and other property were burned or damaged to the value and amount of \$18,884.88. The fire was discovered in its incipency, and the fire department was promptly on the ground, with all the necessary means and appliances to put it out before such damage occurred, and would have done so if the defendant company had furnished water to the mains and hydrants for such purpose, according to its agreement with the city of Green Bay, as hereinafter stated. But on account of the pumping machinery, steam-boilers, and other appliances having become defective, out of order, and insufficient, through the negligence of the defendant, or being negligently used by the defendant, there was not sufficient pressure on the mains or water in the hydrants in the vicinity of said property for such purpose, and said property was therefore burned or damaged as aforesaid. It is charged, in effect, that the defendant neglected to furnish water, through and by its works, to the city of Green Bay, so that said city could and would have put out said fire before it had damaged or destroyed the property of the plaintiff.

The provisions of the ordinance of the city, the acceptance of which constituted the contract between the defendant and the city for the construction of said water-works, material to the case, are as follows: The franchises granted to the company as the consideration of the agreement to do what the ordinance requires are: 1. "To use the streets, alleys, public sidewalks, public grounds, streams, and bridges of the city for placing and repairing the mains, hydrants, water-pipes, and other structures of the water-works"; 2. "To charge and collect rates for furnishing the inhabitants of said city with water for private use." Besides the construction of the water-works as above, the company is required "to supply said city and the inhabitants thereof with water for public and private uses, for public and private consumption, and for putting out fires."

First, the learned counsel of the appellant contend that by the language of the ordinance the water-works company entered into contract relations with the inhabitants of the city, as individuals, to supply them, or for their use and benefit,

water for public use, and for public consumption, and for putting out fires. Such does not appear to be the meaning of this language. It is not that the company shall supply the city and the inhabitants thereof with water jointly and for the same purposes and uses. The city and the inhabitants are by this general language joined together, but it is followed by distributive uses and purposes appropriate to each, — to the city for public uses and consumption and for putting out fires, and to the inhabitants for private use and consumption. It will hardly be claimed that the company is to supply the individual inhabitants with water to put out fires by this peculiar language. They can, if they choose, use the water for such purpose, or to put out their own fires in their own way, but that right is given by another clause of the contract. The company shall furnish the inhabitants with water for private use, and may charge and collect rates therefor. If both the city and the inhabitants are given the right to water for putting out fires generally, their rights would clash; and besides, such a right is a public one, and in no sense private. Such public use of water would be supplied to the inhabitants generally as to the public, but the above language does not require the company to supply the inhabitants with water even in this sense. The inhabitants are mentioned only in respect to their private use of water. This is in accordance with the *gravamen* of the complaint, that the defendant company neglected to furnish the city water to put out the fire that consumed the plaintiff's property, and that the fire department of said city would have extinguished and prevented the spread of the fire but for the negligence and carelessness of the defendant. It is too plain for argument that the plaintiff has no contractual relations with the defendant in respect to being supplied with water to be used in putting out this fire. One of the breaches is, that the fire-hydrants were not kept supplied with water for fire service. The fire department of the city only could use the hydrants for such purpose.

It is not alleged in the complaint, any further than reciting the above language of the ordinance, that the defendant contracted with or for the plaintiff, or that it owed any duty to the plaintiff, or that the defendant had assumed any contract, legal, or moral obligation towards the plaintiff to supply water to put out this fire or any other, and yet it is now claimed by the learned counsel of the appellant, — 1. That the defendant is liable to the plaintiff for the breach of this con-

tract; and 2. For neglect of duty. The matter of contract being out of the question, it remains only to consider whether the defendant is liable to the plaintiff for the neglect of any duty it owed him under the facts stated in the complaint. Such duty, if it exists at all, must be merely inferential from the facts stated, and as it is not defined or alleged in the complaint, the field of inquiry is very wide.

We will consider briefly the various grounds of the defendant's liability to the plaintiff, in view of the facts which the learned counsel of the appellant claim they have found in this wide field of inquiry.

1. It is said that this ordinance has the force of law, and that therefore what it requires the company to do is required by law. That would be so if the city had the power by ordinance to require the company to construct and operate these water-works, irrespective of any contract by which it has agreed to do it. The law or ordinance cannot compel the company to do anything except what it has contracted to do. We can find no duty of the company here. The company is bound only by the obligations of the contract which it has voluntarily assumed, and they are measured by the contract.

2. The company, in carrying out its contract with the city, is liable for injuries to third persons. That is so in cases where the company, in doing anything required by the contract, is brought into such relations with third persons or the public as to create a duty towards them; as if the company, in laying down the pipes or mains, should, by its negligence or that of its employees, allow them to fall upon and injure some third person or one of its employees; as in *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810, and other cases cited under the first point of appellant's brief. This duty is very different from the obligation of the company to perform its contract. It is the common duty of every one not to injure another by his negligence, and not confined to cases of contract. Any person who undertakes to construct public works must not, by his negligence in doing it, injure others.

3. By a contract with another, a person may assume a duty towards other persons. The authorities cited to this point relate to cases where, in carrying out a contract, a person assumes a special and personal duty to those for whose benefit the contract was made; as where a parish employs a physician to attend to certain dependent persons, and he injures such persons by his malpractice, he is liable to such per-

sons, and they may bring an action against him; or as where a person is employed by the owner to drive his carriage in carrying passengers, and by his negligence a passenger is injured, he is liable to such passenger. In such cases, a contracting party is placed in such relation to others as to assume a duty towards them. The physician undertakes to treat a person carefully and skillfully, and he is liable for not doing so to the patient himself, although he may have been employed by others to do so. In carrying out his contract with one, he comes in contact with others, to whom he assumes a new and special liability. In such cases, the person injured by the neglect has no contract relations with the physician or the driver, and their liability does not arise from the contract made with others, but from new relations with and duty towards such persons, and from a new and personal undertaking with them.

4. The law requires the company to furnish water to put out fires, for the benefit of the inhabitants; and the plaintiff, being one, may sue the company for damages for not having done so. We have already seen that the law does not require the company to do so, any further than the law requires the company to perform its contract. We have seen, also, that the plaintiff is neither a party nor privy to the contract.

5. Where the law requires anything to be done for the benefit of the public, any one suffering peculiar injury by the failure to do it may sue, as in the case of the law requiring a railroad company to fence its road. This is also inapplicable, because the law does not require the company to do anything outside or beyond the terms of its contract.

6. Where two persons contract for the benefit of a third person, such third person may sue on the contract and enforce it for his own benefit, as where A owes B, and B owes C; A contracts with B to pay the money directly to C; C may then enforce the contract, and after he has had notice of it, A and B cannot rescind it. In such case, the assent of C is necessary, either by actual notice or by suit. It will be seen that the whole matter is that of contract between A, B, and C. Here the company has not promised or contracted to perform the obligations of its contract to the plaintiff, or any other one, except the city, the other contracting party.

The learned counsel of the appellant have in this way searched for principles on which this action would lie, and have failed to find a single one applicable to the case. The

defendant is not only not required by law to furnish water to put out fires, but has assumed no such duty to the public by its contract. It has contracted to do so, not because it was its duty to the public, but because it deemed it profitable to itself, and was willing to be thus bound by its voluntary contract.

It seems to be impossible to find any sound legal principle on which the liability of the defendant to the plaintiff can be predicated; and the learned counsel of the appellant, with all their ability, research, and ingenuity, appear to have been unable to find any. This court has held that the city itself would not be liable in such a case, even on the strength of its duty to the public: *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760. Could the defendant have reasonably supposed that by this contract with the city it was contracting with or incurring liability to each one of its inhabitants, and that it might be sued by each one individually and separately? If one enters into a contract with another, must he look to see who else might possibly in some way be remotely interested in it and injured by its breach? There would be no end to such a liability. If one contract with a city to build, in a certain time, a bridge over a river within its boundaries, of great public necessity, and he should fail to do so within the time fixed, by the same principle each one of the inhabitants who had suffered some appreciable damages in consequence of the delay might bring an action against him; and so in a great variety of similar cases. By such a liability, the established law of contracts, and the measure of damages on the breach of contracts, would be unsettled and left in endless uncertainty. The parties to a contract are those who are directly interested in it, and who have assented to it, and none are bound by it except the parties and privies, and there must be mutuality. The damages for the breach of a contract must be legal, natural, immediate, proximate, and direct. Remote damages are not recoverable. These are well-established principles which would be violated by such a liability, and the law cast into confusion. Is it a hardship that the plaintiff cannot recover in such a case? So it is in case the city is sued for the neglect of its duty in not furnishing the necessary machinery for putting out fires. It is no greater hardship in one case than in the other. The duty of furnishing water and using it to put out fires still remains in the city. That

duty has not been, if it could be, transferred to the company. The company is bound only by its contract, and liable to the city alone, as the other contracting party, on the contract. Nor does the company perform the functions of a public office so as to be liable for its negligence causing private damage.

We have attempted to reason from elementary principles that such a liability does not exist. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, seems to be the only case in point in favor of such a liability. We are not satisfied with the reasons given in that case for so holding. In all other cases where the same or a similar question was involved the decision has been the other way. The following cases are against such a liability: *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; 37 Am. Rep. 185; *Becker v. Keokuk Water Works*, 79 Iowa, 419; 18 Am. St. Rep. 377; *Atkinson v. Newcastle etc. Water Works Co.*, 2 Ex. Div. 441; 21 Moak Eng. Rep. 541; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 29; 33 Am. Rep. 1; *Foster v. Lookout Water Co.*, 3 Lea, 42; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219; 20 Am. St. Rep. 313; *Beck v. Kittanning Water Co.*, Pa. Sup. Ct., Oct. 1887; 11 Atl. Rep. 300; *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485.

It will be seen that the English and American courts are nearly unanimous in discarding this principle of liability in cases of the same class. The principle contended for by the able and learned counsel of the appellant is almost an entire stranger to our common-law jurisprudence, and has so far failed to obtain recognition except by a single American court. The argument of the learned counsel in favor of the action rests almost entirely, as we have seen, on principles claimed to be analogous in cases well sustained by the courts. But they are not analogous, but distinctively different. This court has no disposition or tendency to ingraft new, strange, and radical principles on the body of our well-established law, under the false guise of progress, to meet the spirit of the age. Principles which reason has established and long experience has sanctioned are very apt to be the best that legislative and judicial wisdom can devise, and the safest criterion of judicial action. The learned circuit court decided correctly that the complaint failed to state a cause of action, based upon reasons clear and conclusive.

By the COURT. The order of the circuit court is affirmed.

WATER COMPANIES — LIABILITY FOR FAILURE TO FURNISH WATER TO PUT OUT FIRES. — The weight of authority, as the court in the principal case remarks, is overwhelmingly against permitting an action to be maintained against a water company by a tax-payer, to whom damage has accrued by reason of the failure of the water supply. But as none of the courts have fairly faced what seems to be the logical result of these decisions, — viz., that the injured person is thus left without any remedy at all, — it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of tax-payers from fire, unless made liable by express statutory provisions: *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256. And it seems equally clear that the city would have no right of action in such a case on behalf of the tax-payer; for the basis of all the decisions is, that there is no privity of contract between the tax-payers and the water companies. If the contract is not made for the benefit of the tax-payers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for the benefit of one of those tax-payers in such a sense that the city can recover damages in his name. In fact, the best evidence that this method of pursuing a remedy would be impracticable is, that it has never been attempted in any of the numerous instances in which these actions have been brought. If, then, neither the tax-payer himself, nor the city on his behalf, can sue the company, the conclusion seems to be, that the loss by the fire in these cases is regarded by the law as damage for which there is no redress. The courts being so nearly unanimous in their views, the only security would seem to be in legislation, or in the incorporation of some suitable provision in future contracts of this description, wherever the tax-payers desire to reserve a personal remedy against the water company.

EHLINGER v. DOUGLAS.

[81 WISCONSIN, 59.]

EVIDENCE, HEARSAY, WHAT IS. — A statement by a wife to her husband, that a dog was in the house, that she could not drive him out, and that he had snapped at her, is hearsay, and is not admissible, in an action against the husband for killing the dog, for the purpose of showing that it had not snapped at his wife.

EVIDENCE — RES GESTÆ — A DECLARATION, TO BE ADMISSIBLE AS PART OF THE RES GESTÆ, must grow out of the principal transaction, illustrate its character, and must be contemporary with it, and derive some credit from it. A declaration of a third person, before the principal act occurs, cannot be admissible as evidence in favor of the person by whom the principal act was done as part of the *res gestæ* thereof.

ACTION to recover the value of a dog belonging to plaintiff, and which had been killed by the defendant. To justify the killing, the plaintiff was permitted to testify that the dog came to his house, that his wife ran out and told him that she could not drive it out, and that it had snapped at her. Thereupon defendant went into his house with a club in his

hand, and the dog ran out. Defendant then took down his shot-gun, loaded it, stepped to the door, and shot the dog as it was coming towards the door. Verdict and judgment for the defendant; plaintiff appealed.

H. H. McKinney, and Doe and Sutherland, for the appellant.

Fethers, Jeffris, and Fifield, for the respondent.

LYON, J. Under the charge of the court, the jury necessarily found that the dog attempted to bite defendant's child; otherwise their verdict must have been for plaintiff. Either there is a failure to incorporate all the testimony in the bill of exceptions, or the learned circuit judge misapprehended the testimony, for it does not tend to show that the dog attempted to bite the child. We will dispose of the case, however, as though the question submitted had been whether the dog attempted to bite the defendant's wife instead of his child, and will assume that the court correctly instructed the jury that if the dog did so the defendant was justified in killing him.

There is no testimony that the dog attempted to bite the wife, other than the testimony of defendant that she said so when she came out of the house and called him, just before the shooting. Upon this testimony alone the judgment rests. The court held, against objection and exception, that the testimony pertained to the *res gestæ*, and hence was competent to prove the attempt of the dog to bite the wife. We are of the opinion that this testimony was mere hearsay, and therefore inadmissible. Had the dog bitten the wife, and were this an action by her to recover damages therefor, probably what she said on coming out of the house would have been a part of the *res gestæ*, and might have been shown. But in this case the essential fact is the shooting of the dog; and the alleged attempt of the dog to bite is an antecedent and independent fact, which must be proved by legal evidence before it can be made available as a justification for the subsequent act of shooting committed by the husband, who was not present when the attempt was made to bite the wife. Had the defendant, immediately after the shooting, said, "This dog attacked me, and I killed him," that would probably be part of the *res gestæ*. But we are aware of no rule of evidence which stamps that character upon a statement, made by a third person to the defendant, of an antecedent fact or circumstance,

so that proof that the statement was thus made becomes competent evidence to prove the truth of the statement.

In *Felt v. Amidon*, 43 Wis. 467, this court approved the doctrine of *Lund v. Tyngsborough*, 9 Cush. 39, wherein it is said: "There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporaneous with it, and derive some degree of credit from it": Per Fletcher, J., p. 42. In 1 Greenleaf on Evidence, sec. 108, note 2, this case is fully approved as containing a correct statement of the law as to what declarations are admissible as parts of the *res gestæ*. As already observed, the main or principal fact or transaction in this case is the shooting of the dog. Most assuredly the declaration of the defendant's wife that the dog attempted to bite her did not grow out of such fact or transaction; neither does it derive any degree of credit therefrom, because the act of shooting had not been committed or contemplated when the declaration was made.

It may be that testimony of the declarations of the wife might have been admissible to disprove malice on the part of the defendant, were the plaintiff seeking to recover exemplary damages. But he only seeks to recover the value of his dog, and the court charged the jury that such value was the measure of damages. Hence the question of malice is not in the case, and it was error to admit the testimony of the declarations of the wife for any purpose. This rule is not affected by the fact that she is an incompetent witness for her husband to prove the fact. It is the misfortune of the defendant — a misfortune which he shares in common with very many litigants — if he is unable to prove his defense.

By the COURT. The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

RES GESTÆ: See, generally, note to *International R'y Co. v. Anderson*, 27 Am. St. Rep. 907. Declarations not made at the time of an accident, which do not explain nor characterize the manner in which the accident occurred, are not concurrent with the injury, nor uttered contemporaneously with it, so as to be regarded as a part of the principal transaction, are not admissible as part of the *res gestæ*: *Chicago etc. R'y Co. v. Becker*, 128 Ill. 545; 15 Am. St. Rep. 144. Declarations, to be admissible as part of the *res gestæ*, must be contemporaneous with the principal facts which they serve to qualify or explain: *Tennis v. Interstate R'y*, 45 Kan. 503; or if separated from the principal act by a certain space of time, must stand in immediate causal relation to the act: *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883. Thus where an alleged transaction is disputed, anything said, done, or written in the

presence of the parties as the immediate, unpremeditated, and spontaneous result of such transaction is admissible in proof of the fact that the transaction occurred or of its true significance: *Monroe v. Snow*, 131 Ill. 126. But the presence of the parties or party to be affected by such declarations, acts, or writings must be established as a prerequisite to their admission as evidence: *Bronson v. Leach*, 74 Mich. 713; *Crane v. McCormick*, 92 Cal. 176; *Du Bois v. Perkins*, 21 Or. 189. Sometimes, however, it may be material to understand the plaintiff's motives or intentions, or mental condition generally, and in such cases statements or declarations preceding the transaction are admitted: *Hemmingway v. Chicago etc. R'y Co.*, 72 Wis. 42; 7 Am. St. Rep. 833; *Cincinnati etc. R'y Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96.

KYLE v. FEHLEY.

[81 WISCONSIN, 67.]

COVENANT OF WARRANTY — EVIDENCE IN ACTION FOR BREACH OF. —

When an action for a breach of a covenant of warranty in a deed by an outstanding lease by the grantor is defended on the ground that the recital that the conveyance was made subject to such lease was kept out of the deed by the false and fraudulent representations of the grantee, his offer to prove that he had proposed to reconvey the land in dispute is properly rejected as immaterial.

DEEDS, REFORMATION OF, FOR MISTAKE. — When an aged German woman, unacquainted with business forms, has agreed to convey land subject to a lease, and is subsequently induced by the false representations of the grantee to execute a warranty deed making no mention of such lease, she is entitled to have the deed reformed in equity, so as to conform it to the agreement of the parties.

MISTAKE OF LAW CAUSED BY FRAUD, imposition, or misrepresentation may be relieved against in equity.

On August 17, 1887, the plaintiff owned a farm of eighty acres in Rock County, Wisconsin. At that time the defendant owned a house and lot in Whitewater, in the same state, and 240 acres of land in Iowa, which land was leased on the shares to one Prebe, the lease running for three years from November 1, 1885. On August 17, 1887, plaintiff conveyed his Wisconsin farm to the defendant, and she, at the same time, and in consideration therefor, conveyed her Iowa farm to him by warranty deed, not mentioning the lease on such farm. On March 21, 1888, plaintiff commenced this action against the defendant, for the breach of covenants in her deed to him because of such outstanding lease. Defendant claimed, by way of answer, that before the execution of the deed by her, the defendant went upon the land mentioned therein, saw the tenant in possession and the lease, and agreed to take the

land subject thereto, and to the rights of such tenant; that such agreement was, by the false and fraudulent representations of plaintiff and his attorney, upon which defendant relied, suppressed and kept out of such deed from the defendant to plaintiff. The answer prayed a reformation of the deed according to the agreement of the parties. Judgment in accordance with the prayer in such answer, and plaintiff appealed.

Doe and Sutherland, for the appellant.

Winans and Hyzer, for the respondent.

CASSODAY, J. The real controversy is, whether the equitable defense alleged in the answer is sustained by the evidence. The objection to the admission of certain testimony upon the trial of this equitable issue is not available as a ground for reversal. This is too well settled to require the citation of authority. The plaintiff offered to show that, October 5, 1887, he proposed to the defendant to have all the lands mentioned reconveyed, but that she refused. The court, as we think, very properly rejected the offer as immaterial under the pleadings.

It is apparent that the defendant and her husband were aged Germans, and but little acquainted with the methods and forms of business. From the very nature of things, they must have relied almost wholly upon the scrivener for the formal writings to carry into execution the oral agreement actually made by the plaintiff and the defendant. The plaintiff admits that during the negotiations of the trade he told the defendant that he would go out to Iowa with her husband and see the farm, and that when he came back he could tell her better how he would trade; that he and her husband did go to Iowa, August 9, 1887; that at Garner they obtained a livery team, and drove out to the farm and to the house upon the farm; that Mr. Fehley talked with a German lady at the house, in his presence; that he then went to Ames to visit his brother; that his brother accompanied him back to Garner; that he and his brother and Mr. Fehley then took a livery team, and again drove out to the farm; that he there saw the lady at the house, and Mr. Prebe working the farm. He professes to have had no conversation with Mr. Prebe, and to have understood nothing of the conversation carried on in German between Prebe and Mr. Fehley; and he expressly de-

nies having said to Prebe, "If I make this trade, I will make it subject to your lease." He admits that he understood that Prebe was working the farm on shares, but claims to have made no inquiry nor to have received any information as to the terms, conditions, or duration of his lease. This visit of the plaintiff to the farm in Iowa was a week or so prior to the drawing of the papers, and for the very purpose of determining upon inspection whether he would make the trade or not. His story as to his want of any knowledge as to the existence, terms, conditions, and duration of the lease, and his failure to make inquiry as to the same, are unnatural and incredible. From a careful examination of all the evidence, we are convinced that he knew all about the lease, and that he agreed to take the farm subject to it and upon the terms and conditions found by the court. The testimony is voluminous, and no detailed statement of it can here be properly made. It is enough to say that the several findings of fact by the court appear to be proved by a clear preponderance of the evidence.

It is contended, in effect, that the defendant was acquainted with the contents of the deed at the time of its execution by her, and hence, that within the ruling of this court in *Neff v. Rains*, 33 Wis. 689, she cannot reform the same on account of her own mistake as to its legal effect. In that case it was, in effect, held that there was no mistake in the contract, as a matter of fact; and that if there was any mistake, it was merely one of law as to the legal effect of the contract, since the contents were well known to the person executing it. Such is undoubtedly the law, even in equity, where the party executing the contract knows its contents, and the same conforms to his agreement: *Storrs v. Barker*, 6 Johns. Ch. 166; 10 Am. Dec. 316, and note. It was said by Marshall, C. J., that "although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake of law is beyond the reach of equity": *Hunt v. Rousmanier*, 8 Wheat. 215. The rule seems to be firmly established, that where the mistake of law is occasioned by fraud, imposition, or misrepresentation, a party suffering thereby may have relief in equity: *Lansdown v. Lansdown*, Mos. 364; *Ladd v. Rice*, 57 N. H. 374; *Brown v. Rice's Adm'r*, 26 Gratt. 467; *Hardigree v. Mitchum*, 51 Ala. 151; *Whelen's Appeal*, 70 Pa. St. 410; *Goodenow v. Ewer*, 16 Cal. 470; 76 Am. Dec. 540; *Spurr v. Home Ins. Co.*, 40 Minn.

425; *Anderson v. Tydings*, 8 Md. 407; 63 Am. Dec. 708, and note.

Thus in the recent case of *Griswold v. Hazard*, 141 U. S. 260, it was held that "an admitted or clearly established misapprehension of law in the making of a contract creates a basis for the interference of a court of equity, resting on its discretion, and to be exercised only in unquestionable and flagrant cases."

This principle has been fully sanctioned by this court, and the authorities reviewed in an opinion by Mr. Justice Orton, in *Green Bay etc. Canal Co. v. Hewitt*, 62 Wis. 331. See also *Silbar v. Ryder*, 63 Wis. 108; *Hagenah v. Geffert*, 73 Wis. 641. In the case at bar the defendant appears to have been induced to execute the deed containing the covenants upon which the action is brought by the imposition and misrepresentations found by the court, and hence a proper case is presented for relief in equity.

By the COURT. The judgment of the circuit court is affirmed.

MISTAKES IN DEEDS — RELIEF FROM. — Relief may be granted from mistakes in written instruments, when the parties can be replaced in their former position: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. Equity will relieve against a mistake in a deed, upon satisfactory parol proof of such mistake, notwithstanding the fact that it is denied by the opposite party: *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559, and note. If, by mistake, an instrument is drawn and executed materially variant from the understanding of the parties, equity will relieve, on clear proof: *Coger v. McGee*, 2 Bibb, 321; 5 Am. Dec. 610, and note. A mistake in drawing an instrument contrary to the intention of the parties is a ground for relief in equity: *Chapman v. Allen*, Kirby, 399; 1 Am. Dec. 24. The fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and the latter misrepresented the state of the facts: *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146.

MISTAKE OF LAW — WHEN RELIEVED AGAINST. — An insured, induced by the false representations of the insurer, through his agent, as to the law of the case, to surrender a policy of insurance upon the payment of a sum much less than that recoverable, is entitled to relief: *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note with cases discussing relief from mistake of law; also extended note to *Black v. Ward*, 15 Am. Rep. 171-184; note to *Lawrence v. Beaubien*, 23 Am. Dec. 164, 165. A mistake of law, to be relieved against in equity, must be gross and palpable, and such as would warrant the belief that the party was imposed upon, owing either to his imbecility of mind or the exercise of some improper influence over him by one with whom he dealt: *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540, and note. See also *Frevall v. Fitch*, 5 Whart. 325; 34 Am. Dec. 558, and note.

SECOND NATIONAL BANK v. MERRILL.

[81 WISCONSIN, 142.]

FRAUDULENT CONVEYANCES — GIFT FROM PARENT TO CHILD — DELIVERY — VALIDITY. — A gift of a note by a father to his minor child, made by delivering the note to the child's mother as its trustee, marking it with its name, it being laid aside to be kept by the mother for the child, is valid, as against existing and subsequent creditors of the vendor, if made in consideration of natural love and affection, when the donor was free from pecuniary embarrassment, and the gift was but a small part of his estate, and only a reasonable provision for the child.

FRAUDULENT CONVEYANCES — GIFT FROM PARENT TO CHILD — VALIDITY AS AGAINST CREDITORS. — When a father in good financial circumstances makes a valid gift of a note to his minor son, and receiving payment of the note during the minority of the child, transfers stock to him in lieu of the note, and after the son has attained his majority and the stock has become worthless, the father conveys land of equal value with the original note to the son in lieu of such stock, the conveyance cannot be successfully attacked by a subsequent creditor of the father, in the absence of proof of an intent to defraud; nor will the delay of the son in recording such conveyance vitiate it, unless an intent to defraud creditors of the father is shown.

CONTRACTS — CONSIDERATION — INCREASE IN WAGES. — When a father, largely interested in a manufacturing company by which his son is employed, promises the latter, after he has attained his majority, to increase his wages and to pay such increase personally as an inducement to the son to remain in the employ of the company, such promise is based upon a valuable consideration, and cannot be successfully assailed by subsequent creditors of the father.

A. A. and F. D. Jackson, for the appellant.

William Ruger and B. B. Eldredge, for the respondent.

ORTON, J. The respondent commenced an action against the Merrill and Houston Iron Works, and S. T. Merrill, and C. F. G. Collins on a note of five thousand dollars given by said Collins to Merrill and Houston Iron Works, and indorsed by the said company on July 13, 1883, and indorsed by S. T. Merrill on October 24, 1883. Pending such action, garnishee proceedings were instituted against the appellant, Louis B. Merrill, to answer as to his having or holding any property belonging to the defendant in the action, S. T. Merrill. On issue joined, the main question litigated was, whether a conveyance by S. T. Merrill and wife to Louis B. Merrill, made July 7, 1883, of sixteen acres of land in the city of Beloit, was made with intent to hinder, delay, or defraud the creditors of said S. T. Merrill, and was therefore void. The undisputed facts appear to be as follows:—

S. T. Merrill, on the twenty-fifth day of December, 1868, held four notes of Benjamin Field and Israel Williams, dated August 15, 1868, each for \$1,971.75, due in two, three, four, and five years, respectively, and each note, at that time, imported an indebtedness, principal and interest, of the sum of \$2,028.75. On that day, as a Christmas gift to his children, he gave what he supposed was about one thousand dollars to each, as follows: He gave to Mary L. and George S. Merrill one of the notes; to Louis B. Merrill and Annette Merrill another; and to Ellen C. and Robert Merrill another of said notes. The other of said notes he passed over to his wife in payment of his indebtedness to her. He wrote the names of the children on their respective notes, and handed them to his wife, and their mother, to keep for them until they should each become of age. They were placed in envelopes marked with the children's names to whom they belonged, and then they were placed by her in a drawer in her own room to be so kept. S. T. Merrill afterwards collected the interest and principal of these notes, as they became due, for his children, to the extent of their respective interests therein. At the time of this gift to his children, S. T. Merrill was a man of comparatively large wealth, having available property and securities of the value of over eighty thousand dollars, and was indebted less than ten thousand dollars.

In 1878, on the organization of the Merrill and Houston Iron Works, S. T. Merrill, having collected his share in the notes, procured the issuing of ten shares of stock in the new company to Louis B. Merrill, in commutation, exchange, or payment of his one-thousand-dollar interest in one of said notes. The shares of said stock were for one hundred dollars each, and were then of the value of their face. This stock remained in the name of Louis B. Merrill on the books of the company until the assignment of the same to S. T. Merrill in 1883. At the time of this exchange, S. T. Merrill appears to have owned properties and securities of the value of about eighty thousand dollars over and above his debts. He then considered his wealth sufficient for him and his wife to make the tour of Europe, and soon thereafter they went abroad.

In 1881, after Louis B. Merrill became of age, he worked in the shops of the Merrill and Houston Iron Works, at \$1.50 per day. He was dissatisfied with his condition, and talked of leaving home to better it. His father, S. T. Merrill, to induce him to remain at home, promised him personally to make his

compensation equal to that of his brother George, the company to pay him the \$1.50 per day, and the father to pay the balance. S. T. Merrill had at that time a very large interest in the company. In this way S. T. Merrill became indebted to him from three hundred to five hundred dollars. About the seventh day of July, 1883, the stock of the company had become greatly lessened in value, and the father, S. T. Merrill, probably deemed it right that his son Louis B. Merrill should not suffer by this falling in the value of the stock, and wishing to pay him the wages he had promised, proposed to him to sell him the said sixteen acres of land, which was then not of much, if any, value over the one thousand dollars he gave him on Christmas, 1868. Louis B. Merrill accepted the proposition, and accordingly, S. T. Merrill and his wife executed a deed to him of the said sixteen acres of land on the seventh day of July, 1883, and when signed, witnessed, and acknowledged, said deed was delivered to the mother, Mrs. Merrill, for said Louis B. Merrill, he being then absent. When informed by the mother that she held the deed for him, on the evening of said day he requested her to take care of it, or let it be as it was, as he was then in a great hurry. The note on which this action was brought was given on the thirteenth day of July, 1883, and S. T. Merrill did not indorse the same until the twenty-fourth day of October, 1883. Louis B. Merrill, on the delivery of the deed, transferred to his father his said shares in the stock of said company, and transferred also to him the certificate thereof, and acknowledged the payment of his said wages as the consideration of said deed. At that time S. T. Merrill evidently supposed that he was still a man of great wealth, and very far from insolvency, and it seems that the respondent bank deemed his personal indorsement of said note, in October afterwards, quite important, and as giving increased value to the security.

S. T. Merrill testified that he never had any intention to hinder, delay, or defraud his creditors in any of these transactions with his son Louis B. Merrill. The circuit court found that this conveyance was made with such intent, and set it aside, and required Louis B. Merrill to surrender this land to the payment of the judgment in this action.

These facts are substantially sustained by the testimony, and in accordance with the findings of the court.

1. The learned counsel of the respondent contends, first, that the gift of the note on the twenty-fifth day of December,

1868, was void for want of execution and delivery. How could a father make a gift to a minor child of ten years of age? It would seem idle to deliver it personally to the child, especially if it be a promissory note. The most common and approved method of perfecting the gift in such a case is by delivering it to the child's parent, guardian, or friend, in trust for the child. This gift was delivered to the child's mother as such trustee, and it was marked with the child's name, and laid aside to be kept by the mother for the child. At the time it passed entirely out of the possession of the donor, and the possession was given to the trustee. This gift is not attacked for fraud. The father had ample means and ability to make the gift. In consideration of his natural love and affection for his son, he intended to make it, and he carried out that intention in the most approved and lawful manner. The delivery of the gift to his mother was sufficient to perfect it. The authorities cited by the learned counsel of the appellant are conclusive of the question, and very closely in point. Many of the cases in which such a gift to a minor child by its parent has been upheld are far more questionable than this. In *Gardner v. Merritt*, 32 Md. 78, 3 Am. Rep. 115, the gifts were of money, by the grandmother to her grandchildren, and they were delivered by depositing the money in the bank to their credit. But by the by-laws of the bank it was subject to her order or that of her daughter. The daughter sought to withdraw the money from the bank, as executrix of the grandmother. The gifts were upheld as perfected gifts. In *Kerrigan v. Rautigan*, 43 Conn. 17, an aunt deposited \$460 in a savings bank for her niece. It was placed to her credit, and her guardian's credit also, on the books, and the guardian informed of it. A bank-book, with this deposit entered in it, was delivered to the aunt, and she retained possession of it, and afterwards she had the guardian transfer the money back to her. It was held that the aunt intended it as a gift to the niece, and that it was a perfected gift, beyond her power of revocation. In *Grangiac v. Arden*, 10 Johns. 293, a father bought a ticket in a lottery, which he gave to his infant daughter, and wrote her name upon it; and after it had drawn a prize, he declared that he had given the ticket to his child, and that the prize money was hers. It was held that a jury might infer from these facts all the formalities requisite to a valid gift, and that the title to the money was complete and vested in the daughter. See also *Lemon v. Phas-*

nix Mut. L. Ins. Co., 38 Conn. 294; *Smith v. Ossipee Val. T. C. Sav. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400; *Hill v. Stevenson*, 68 Me. 364; 18 Am. Rep. 231.

The gift having been made by the parent to the child, it was irrevocable: *Kellogg v. Adams*, 51 Wis. 138; 37 Am. Rep. 815. Such a gift is valid as against subsequent creditors of the donor, and as against existing creditors also, if made in consideration of natural love and affection, and when the donor was free from embarrassment, and the gift was but a small part of his estate, and it being a reasonable provision for the child, and made without intent to defraud: *Salmon v. Bennett*, 1 Conn. 525; 7 Am. Dec. 237; *Carr v. Breese*, 81 N. Y. 584; Wait on Fraudulent Conveyances, sec. 102; *Carpenter v. Roe*, 10 N. Y. 227; *Crawford v. Logan*, 97 Ill. 397; *Clark v. Killian*, 103 U. S. 766; *Wallace v. Penfield*, 106 U. S. 260; and other cases cited in appellant's brief.

2. There can be no fraud predicated on the future conduct of S. T. Merrill in respect to the gift after it was perfected by delivery. He obtained the possession of the note, and collected principal and interest, and then exchanged the product for ten shares of the Merrill and Houston Iron Works, worth one thousand dollars. It was only one thousand dollars of the note that was given. The balance belonged to S. T. Merrill, and in place of that one thousand dollars he had this stock issued to the appellant, and then afterwards, by agreement with the appellant, S. T. Merrill deeded the sixteen acres of land to him in consideration of the transfer of this stock. That S. T. Merrill could do nothing afterwards to invalidate this gift is too plain for argument or authorities. If he could do so, then it follows that he could revoke the gift at his pleasure, and that, we have seen, he could not do. He could not do indirectly what he could not do directly. He could do nothing to invalidate the gift. S. T. Merrill became trustee of the appellant in managing the subject of the gift afterwards. It may be that he was trustee *de son tort*, but liable to account to the beneficiary just the same for the management of the trust property; and if he has converted the specific gift into other property, the beneficiary can follow it there, and claim such property. These are elementary principles. The conversion of the note or its product into the stock of the new company was thought to be for the best, and for the benefit of the appellant, at the time. If afterwards such stock became depreciated or worthless in his hands, it was very proper, and

the duty of S. T. Merrill, to keep it good, and make it worth at least one thousand dollars to the appellant, and in some way to return the gift of which he had voluntarily become the trustee. It was even more proper for him to convey the land to the appellant in exchange for the stock, than to exchange the note or gift for the stock in the first place. It would make no difference, as to the validity of the conveyance of the sixteen acres, whether three hundred or five hundred dollars of the consideration was a valid claim against S. T. Merrill or not, unless there was an intent to defraud creditors. The want of or an insufficient consideration is no ground of fraud in law: Rev. Stats., sec. 2323. There is nothing in this case that could make that deed fraudulent or invalid as to creditors, except an intent to defraud them by S. T. Merrill, the grantor, and with the knowledge of such intent by Louis B. Merrill, the appellant: Rev. Stats., sec. 2323; *Hooser v. Hunt*, 65 Wis. 71; *Hoey v. Pierron*, 67 Wis. 262.

3. The plaintiff being a subsequent creditor, he must prove a fraudulent intent, or he cannot question the conveyance: *Ford v. Johnston*, 7 Hun, 568; *Seward v. Jackson*, 8 Cow. 406; *Sexton v. Wheaton*, 8 Wheat. 229; *Phillips v. Wooster*, 36 N. Y. 412; *Smith v. Vodge*, 92 U. S. 183; and other cases cited in appellant's brief. But the wages of the appellant in the shops of the company which S. T. Merrill promised to pay him were a valid debt. S. T. Merrill had a very large personal interest in the business of the company, sufficient to make a valuable consideration for such a promise: *Lathrop v. Knapp*, 27 Wis. 214; *Amherst Academy v. Cows*, 6 Pick. 427; 17 Am. Dec. 887; *Williams College v. Danforth*, 12 Pick. 541.

4. The delay in recording the deed until November is said to be a badge of fraud. The rights of creditors do not depend upon registration or on failure to register a deed: *Crawford v. Logan*, 97 Ill. 396. The appellant could have his deed recorded at any time he pleases, the only risk being a subsequent conveyance recorded first. But it is said the failure to record the deed gave S. T. Merrill credit, and that the respondent bank took his indorsement of the five thousand dollars when the land stood in his name on record. This means that the bank trusted S. T. Merrill on the strength of his ownership of the sixteen acres. There is no proof of this. That land would not have given S. T. Merrill that much credit, at the most. It is presumed that the appellant merely delayed having his deed recorded. There is no proof that he

knew of this claim against his father, or any other claim, or that his father was greatly in debt, embarrassed, or insolvent. There is no proof that Louis B. Merrill knew anything about his father's financial circumstances. They both testified that they had no intention to defraud the creditors of S. T. Merrill, or any one else, in the execution of the deed or in any other of the transactions. If there was any proof that S. T. Merrill had any such intention, there was not a particle of proof that Louis B. Merrill knew of it or suspected it. The inception of this claim against S. T. Merrill was that generous and affectionate Christmas gift in the winter of 1868. It would seem to be a *dernier ressort* to attempt to make a fraud out of this conveyance of the land in consideration of the stock and the wages of the appellant, when the land itself is worth but little, if anything, more than the Christmas gift twenty-three years ago. That is all that Louis B. Merrill has made out of it. It has barely kept the gift good for one thousand dollars without interest. It is impossible to find in all the facts of this case the slightest evidence of an intent to defraud creditors on the part of S. T. Merrill or his son, and no such intent can be inferred from the facts. Nothing appears in the case, except that which was honorable, generous, and just, on the part of either of them.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with direction to dismiss the proceedings of garnishment against Louis B. Merrill.

GIFTS — SUFFICIENCY OF DELIVERY. — The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it directly to the donee, or he may impress upon it a trust for the benefit of the donee: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290, and note. See *Atkinson, Petitioner*, 16 R. L. 413, 27 Am. St. Rep. 745, where it was held that deposits, in trust, made by a parent for his children would be treated as gifts, and not as advancements.

CONVEYANCES BETWEEN PARENT AND CHILD — WHETHER FRAUDULENT. — Whether a voluntary conveyance to a child will be fraudulent as to creditors of the father, in the absence of actual intent to defraud, will depend upon its reasonableness, and the condition of the grantor financially at the time of the conveyance: *Stewart v. Rodgers*, 25 Iowa, 395; 95 Am. Dec. 794, and note. A voluntary conveyance to a child, relative, or even to a stranger, is valid, if it is not at the time prejudicial to the rights of any other person: *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177, and note. A deed of gift from a father to his son is not necessarily fraudulent as to creditors, when the donor had, at the time of the gift and at his death, sufficient property to pay all his debts due at the date of the deed; *Jones v. Young*, 1 Dev.

& B. 352; 28 Am. Dec. 569, and note. A gift by a father to his child of a small part of his estate, made at a time when the donor was perfectly solvent, will be supported, although he afterwards became insolvent: *Howard v. Williams*, 1 Bail. 575; 21 Am. Dec. 483, and note. A parent who was a judgment debtor paid, with money in her possession, for certain land, which she directed to be deeded to her children. It was held that this alone, without evidence as to the ownership of the money, was not sufficient to overcome the presumption that the legal title was in the children: *Stoddard v. Rowe*, 74 Iowa, 670. When a son who was not indebted agreed to convey a piece of land to his father if the latter would buy a lot and build a house for him in town, which the father did, and also took possession of the tract of land openly and exclusively as his own, the father's rights cannot be divested by a sale under execution at the suit of a creditor of the son, whose debt was contracted after the agreement: *Coffey v. Smith*, 101 Mo. 229.

SECOND NATIONAL BANK v. MERRILL.

[81 WISCONSIN, 151.]

FRAUDULENT CONVEYANCES — HUSBAND AND WIFE — SEPARATE ESTATE. —

When a husband in good financial circumstances gives his wife notes in payment of his ante-marriage debt due her, and after collecting the money on the notes, transfers corporate stock of equal value to her in lieu thereof, and after selling part of the stock, invests the proceeds in land for her, such land, as well as the remainder of the stock or its proceeds, is the property of the wife, and cannot be taken by the husband's subsequent creditors, in the absence of proof of an intent to defraud, although the husband has become insolvent, and has always managed such property as his own, and as not belonging to his wife.

HUSBAND AND WIFE. — STATUTE OF LIMITATIONS does not run against a wife on a note given her by her husband in payment of an ante-marriage debt due from him to her, and the presumption of payment from lapse of time will not prevail against her.

HUSBAND AND WIFE — MANAGEMENT OF WIFE'S SEPARATE ESTATE BY HUSBAND. — The fact that a husband has the management of his wife's separate personal property as if it belonged to him, and not to the wife, will not affect her title to it, so far as the creditors of the husband are concerned.

A. A. and F. D. Jackson, for the appellant.

William Ruger and B. B. Eldredge, for the respondent.

ORTON, J. This is another of the garnishee actions in the main action of the respondent bank against Merrill and Houston Iron Works, Sereno T. Merrill, and C. F. G. Collins, as set out in the preceding case, *ante*, p. 870. As the result of the trial of the garnishee issue, the circuit found and adjudged the deed executed by S. T. Merrill to Jane B. Merrill, his wife, on November 28, 1882, of a triangular piece of

land in the city of Beloit was so made with intent to defraud creditors and is void, and other things hereafter mentioned. The following are believed to be the main facts established by the evidence:—

The facts in relation to the Christmas gift on the twenty-fifth day of December, 1868, by S. T. Merrill, the father, to his six children, of three of the four notes he then held against Benjamin Field and Israel Williams, are stated in the preceding case. On that same day he transferred and delivered the other of said notes, then amounting to a little over two thousand dollars, principal and interest, to his wife, Jane B. Merrill, in consideration and payment of about that sum that he owed her for borrowed money and teacher's wages before they were married, and which constituted a part of her separate estate at the time of their marriage and afterwards. For a part of the same he gave to her his note, which, however, she destroyed, and at the above date the debt was barred by the statute of limitations. It seems that she did not wish to hold his note, or to sue him for the money, which would seem to be perfectly natural to a confiding and sensitive wife. The fact of this indebtedness of S. T. Merrill to his wife at that time depends exclusively upon the testimony of his wife and himself, which was uncontradicted, and there is no good reason for disbelieving or questioning it. Transactions so long ago would not likely be remembered and could not be stated in their particulars with the clearness of those more recent. But there can be no well-grounded criticism of their testimony that ought to impeach it or cast any doubt upon it. When the note of Field and Williams was so delivered to Mrs. Merrill by her husband, she put it away in her room, and it was there kept by her. One of the children, Annette Merrill, to whom the father, S. T. Merrill, gave one half of one of said notes on Christmas, 1868, died, and Mr. Merrill gave that interest in said note to his wife.

In 1873, when O. E. Merrill & Co. were incorporated in the name of Merrill and Houston Iron Works, and transferred all their assets and earnings to said corporation, of the value of at least one hundred thousand dollars, and S. T. Merrill had received his one fourth of its shares of stock, his wife gave to him her said note and one half of another note that had been given to Annette Merrill, and the accrued interest, to be invested in the stock of Merrill and Houston Iron Works for her. S. T. Merrill then caused fifty shares of said stock to

be issued to her in payment for said notes, or what he owed her for money collected on them for her, which amounted to about five thousand dollars. In 1877, Mrs. Merrill, through her husband, invested her stock in the iron works in the stock of the Eclipse Windmill Company, and received fifty shares of stock in that company, — an even exchange of the stocks. In 1880, Mrs. Merrill, through her husband, sold her stock in the Eclipse Windmill Company to Fairbanks, Morse, & Co. for eight thousand dollars, and received their two notes for it of four thousand dollars each. The first one due of these notes she loaned to the Merrill and Houston Iron Works, without security, and the other note she gave to her husband as the consideration of said deed to her of the triangular piece of ground in Beloit, on the twenty-seventh day of November, 1882. Mrs. Merrill had possession of the notes until they were so disposed of. This deed was made directly to Mrs. Merrill by her husband, and afterwards, learning that such was not the proper way, on the nineteenth day of September, 1883, another deed was made by S. T. Merrill to one Dickerman, and Dickerman deeded the lot to Mrs. Merrill, to cure the other deed. In 1880 the Merrill and Houston Iron Works gave to Mrs. Merrill eight thousand dollars in stocks to secure her for the note of four thousand dollars she loaned to them as above stated, and in 1883 that company gave her two two-thousand-dollar notes to secure her for the same, and she surrendered to the company said stock. Mrs. Merrill received a small dividend on the assignment of the company on these notes. Mrs. Merrill sent from two thousand to two thousand five hundred dollars of money to a mortgage and trust company in the state of Kansas, to be loaned out for her, and she holds their security for the same. This money she received for rents of her house on said lot, for board of some of her children, five hundred dollars from her brother, and the balance from other sources in which her husband was not interested.

These are briefly the facts. The circuit court made very long findings of fact and conclusions of law, which need not be specially noticed. The judgment predicated on the above facts is only important. It is useless to consider the exceptions to the findings of fact. The judgment of the circuit court is, substantially, that the said deed of the triangular lot in Beloit is void for fraud against creditors, and that the two notes of Merrill and Houston Iron Works, given to her to secure

her for the loan of the note of four thousand dollars to the company, are held by her fraudulently, and that they are void, and liable to be applied to plaintiff's demand; and that eleven hundred dollars of the securities of the mortgage and trust company she holds in the form of real estate coupon bonds is a part of her separate property, and fourteen hundred dollars thereof, with accrued interest, is the money of S. T. Merrill, and liable to be applied on plaintiff's demand.

As a question of fact, it does not appear that either S. T. Merrill or his wife had any intent to defraud his creditors in any of the transactions above mentioned, and no such inference can be drawn from the facts.

1. Mrs. Merrill had from the start a separate estate of at least two thousand dollars, and it consisted of money loaned to her husband and of a debt against him for wages. The learned counsel of the respondent contends that at least a part of that estate, which consisted of the note of S. T. Merrill of five hundred dollars, should not be considered a part of the consideration of the purchase of the note on December 25, 1868, because the note was barred by the statute of limitations, and was burned up. The statute of limitations does not run against a wife, and presumption of payment by lapse of time does not prevail against her. She ought not to be compelled to treat her husband as a stranger. Any other policy would beget disagreement and distrust: *Barnett v. Harshbarger*, 105 Ind. 410; *Dice v. Irvin*, 110 Ind. 561. How natural is that scene of her burning the note on their marriage, as if to say: "I guess I can trust you without your note." But if there was no consideration for the sale of the note to Mrs. Merrill, and if it was a mere gift, it was valid. He was then a man of wealth, and in debt but little, if any, and it was suitable to their circumstances: *Gray v. Barton*, 55 N. Y. 68; 14 Am. Rep. 181; *Henschel v. Maurer*, 69 Wis. 576.

2. But the respondent's claim is long subsequent, and it cannot question the fact of the sale, and there could not have been any attempt to defraud creditors at that time certainly, for there could have been no motive or object. The circuit court does not find fraud in that transaction, but holds it void upon the theory that it did not take place, or that it was a sham, and not real.

3. It is said S. T. Merrill dealt in and managed all these stocks and notes as his own, and not as belonging to his wife. If he did do so, it will not affect her title. But he acted as

her agent in what he did, and so they understood as between themselves. They were husband and wife, and had the right to keep such a "family secret," if it was one.

During all these transactions S. T. Merrill was a man of wealth, and not at all embarrassed by his debts, and was abundantly solvent; and at the time of the sale of the 2.18 acres of ground in Beloit by S. T. Merrill to his wife, he owned assets of the value of between sixty thousand and seventy thousand dollars, and was not personally in debt to any large amount. It seems that S. T. Merrill was regarded of such good financial credit that it must have been important as security to obtain his indorsement on the note in suit as late as October, 1883, more than a year afterwards. The judgment in this case has taken away half of the separate estate that Mrs. Merrill owned when she was married to S. T. Merrill over thirty years ago, and all the interest and increase obtained by its judicious investment since have gone with it. The testimony of S. T. Merrill and his wife is either true, or they committed perjury. They both testified that they had no intent to defraud his creditors or any one else in any of their transactions. It must be found that Mrs. Merrill participated in the intent to defraud, to invalidate any of these transactions, and there is not the least evidence of it. Good character is always valuable and available to one on trial for crime even. The high standing and excellent character, good reputation, and pure life of S. T. Merrill and his wife ought to weigh down all the flimsy criticisms and suspicions cast by this trial on nearly all the transactions of their lives while together as husband and wife. It is impossible to find any evidence of fraud or intent to defraud in any of their transactions which they have been compelled to detail on this trial under oath. In such cases, it often happens that "trifles light as air" are seized upon as badges of fraud, in the absence of all reliable evidence of fraud. Those two notes of the Merrill and Houston Iron Works belong honestly to Mrs. Merrill; that lot in Beloit is hers, because she bought it with her own means; and that money loaned in Kansas is all hers, and she sufficiently accounted for it as a part of her separate estate. We are satisfied that the judgment is against all the testimony.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with direction to dismiss the garnishee proceedings against Jane B. Merrill.

HUSBAND AND WIFE — FRAUDULENT CONVEYANCES. — As to effect of use and control of wife's separate property by husband, see *Dean v. Bailey*, 50 Ill. 481; 99 Am. Dec. 533, and note; *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173, and note; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78; *Swartz v. McClelland*, 31 Neb. 646; *Atwood v. Dolan*, 34 W. Va. 563.

THAT A HUSBAND MAY, AS AGAINST HIS CREDITORS, CONVEY HIS PROPERTY TO HIS WIFE in payment of his indebtedness to her, see note to *Steele v. Coon*, 20 Am. St. Rep. 715. So a husband honestly indebted to his wife may give to her a chattel mortgage to secure the debt, although he is at the time of executing it unable to pay all his debts in full; and when it is found that the mortgage was given with an honest intent, and not for the purpose of hindering, delaying, or defrauding creditors, it is valid: *Spaulding v. Keyes*, 125 N. Y. 113. It is not a voluntary conveyance for a husband to execute a bill of sale conveying chattels to his wife equal in value to a loan which he had received from her ten years before, and orally promised to repay: *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748. Nor, where a husband, by the direction of his wife, sells her land, and with the proceeds of the sale purchases other lands, and takes the deed for them in her name, will the transaction be considered fraudulent in chancery as against a judgment creditor of his: *Williams v. Morgan*, 6 Houst. 439. In a suit to divest a wife of title to land conveyed to her by her husband in fraud of existing creditors, it is not necessary to allege fraud on her part: *Jordan v. Buschmeyer*, 97 Mo. 94. When a conveyance from an insolvent husband to his wife is attacked for fraud, the onus is on the wife to show that a consideration in the shape of money paid, the discharge of a debt due from him to her, or something of value actually passed, but when the wife has offered testimony sufficient to convince the jury of the existence and validity of the consideration, the burden of showing fraud is shifted to the attacking party. If the jury shall then be satisfied that the conveyance was made by the husband to the wife to hinder, delay, or defeat his creditors, and this was known to and participated in by the wife, it is their duty to find that it was fraudulent, although a valuable consideration passed: *Peeler v. Peeler*, 109 N. C. 628.

HUSBAND AND WIFE — STATUTE OF LIMITATIONS. — Husband's mortgage to his wife to secure a debt barred by the statute of limitations is valid, because he is not obliged by any duty to his creditors to interpose the plea of the statute of limitations: *Manchester v. Tibbells*, 121 N. Y. 219; 18 Am. St. Rep. 816, and note.

CUTLER v. BABCOCK.

[81 WISCONSIN, 195.]

STATUTE OF FRAUDS. — THE ACTS OF PART PERFORMANCE which will take a parol contract out of the statute of frauds must be referable to and in part execution of the contract, and not referable to some other title, and must be prejudicial to the party claiming specific performance, and for which he would be liable to compensation in damages if the contract were not enforced.

STATUTE OF FRAUDS — PART PERFORMANCE. — **POSSESSION** is an act of part performance as to both parties to an agreement relating to real prop-

erty, and entitles both to relief by the specific performance of such agreement.

STATUTE OF FRAUDS—PART PERFORMANCE.—THE RETENTION OF POSSESSION OF REAL PROPERTY under a parol contract for its transfer to the party so retaining it may amount to an act of part performance of such contract.

STATUTE OF FRAUDS—JUDICIAL SALE, AGREEMENT TO PURCHASE FOR AND CONVEY TO DEFENDANT.—If an oral agreement is made between a mortgagor and a mortgagee, that for the purpose of clearing the title to the property mortgaged the mortgage shall be foreclosed and the premises purchased by the mortgagee, and that certain portions shall be by him conveyed to the grantee of the mortgagor and the residue to the mortgagor himself, and pursuant to the agreement a foreclosure is had and a sale thereunder made to the mortgagee, who conveys to the grantee of the mortgagor as agreed, and also permits the mortgagor to remain in possession of the other parcels for many years, but refuses to convey on demand to the mortgagor, the latter is entitled to a decree requiring such conveyance to be made. Such mortgagee is, under the circumstances, a trustee *ex maleficio*, whom equity will compel to perform his trusts.

ACTION to recover certain real property, in which judgment was for the plaintiff for two lots only. These lots and others being, in September, 1858, the property of the defendant Babcock, he and his wife then executed a mortgage for the sum of fifteen hundred dollars, no part of which was advanced or paid by plaintiff. Subsequently, Babcock sold and conveyed certain lots to one Cook, and received the purchase price thereof with the consent of the plaintiff. Afterwards Babcock, with a view to clearing the title to the mortgaged property, made an agreement with the mortgagee that the latter should foreclose his mortgage and bid in the property at the foreclosure sale and receive a conveyance thereof, and should convey to Cook his lots and to Babcock the other lots. In September, 1860, the foreclosure took place according to the agreement, and in due time plaintiff conveyed to Cook the lots to which he was entitled. Babcock continued in possession after the foreclosure sale as before, but on demanding a conveyance of plaintiff, the latter refused to make it, and commenced this action to recover the property.

Ryan and Merton, for the appellants.

J. V. V. Platto, for the respondent.

PINNEY, J. The court below decided that the defendant Babcock, by consenting to the foreclosure of the mortgage and to the plaintiff bidding in the premises on the sale under the foreclosure judgment and the taking of the title to the lots in

himself, as set forth in the findings of fact, attempted to create a trust in the two lots in question resting in parol, which was void under the statute of frauds, and that the plaintiff's legal title thus acquired must prevail, and therefore allowed him to recover against the defendants the lots in question. Whether this is the correct legal conclusion from the facts found is the only question for decision.

The finding, more briefly stated, is to the effect that, inasmuch as Babcock desired to clear up the title to the premises embraced in the mortgage to the plaintiff, it was agreed between them, at Babcock's request, that the plaintiff should foreclose the mortgage, bid in the property at the sale under the foreclosure judgment, and take a sheriff's deed thereof, and that he should convey the title to lots 8, 9, 10, and 11, described in the mortgage, upon request, to Cook, and upon like request he should convey to the defendant Babcock lots 17 and 18, upon condition Babcock would pay the costs and expenses of such proceedings; that the contemplated foreclosure and sale took place, and the premises affected thereby were conveyed to the plaintiff by the sheriff; that in reliance upon plaintiff's promise to convey said premises as aforesaid, Babcock permitted the plaintiff to bid in said real estate at said sale, and take the title thereto in his own name, — that is to say, he was induced thereby not to take any other measures to secure the title to himself than those contemplated by the agreement. It is stated in the latter portion of the finding that the agreement to convey by plaintiff was "that he would convey said lots to the defendant or such persons as he might designate."

The plaintiff has performed his part of the agreement, so far as lots 8, 9, 10, and 11, which were to be conveyed to Cook, are concerned, the consideration for which lots Babcock received with plaintiff's consent, and indeed he fully complied with his part of the agreement in all respects, except as to lots 17 and 18, which he refuses to convey to the plaintiff. It is a just inference that Babcock paid the costs and expenses of the proceedings from the fact that the plaintiff made the conveyance to Cook which was to follow, and not precede, such payment, from the long period of time that has elapsed, and the fact that no claim appears to have been made by the plaintiff in the action that Babcock had been at any time in default in this or any other respect in performing the agreement on his part. The agreement, therefore, has been fully

performed, except as to the conveyance by the plaintiff to the defendant Babcock of the lots in question. The plaintiff insists upon holding and enforcing the legal title so acquired by him, for the reason that, being by parol, it is within section 2302 of the Revised Statutes, which is, that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing"; and relies upon the case of *Rasdall's Adm'rs v. Rasdall*, 9 Wis. 879, and other cases of the class to which it belongs. The provisions of this section, however, are subject to those of section 2805 of the Revised Statutes, that nothing therein contained "shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance of such agreements."

The object of the agreement under consideration, and the purchase which the defendant permitted the plaintiff to make, by foregoing, in pursuance thereof, his right to bid in the lots at the sheriff's sale, and by which alone the plaintiff was allowed and enabled to obtain the legal title, was not the creation of an express trust by parol in the lots in question in contravention of the statute, but, as found by the trial court, was for the sole purpose of clearing the title of said real estate, and the foreclosure and the purchase at the sheriff's sale effected by the deed to the plaintiff were successive steps to be performed in the execution of the agreement in question, which was to culminate in the conveyance by the plaintiff to Babcock of the lots, when the title should be perfected in the manner contemplated by the parties.

In ascertaining the legal effect of the agreement, it is to be borne in mind that Babcock, when the agreement was made and the sale took place, was understood to be, and was, the owner of the lots in question, subject to the mortgage to the plaintiff, and was not a mere stranger to the title.

The fact that, pursuant to the agreement, Babcock was induced to forego his right to bid in the property, so that the title thereto might be perfected, and the plaintiff was thus enabled to obtain title solely upon the faith of his agreement to convey it to Babcock, or to such persons as he might desig-

nate, together with the continued possession by the latter for such a long period of years without his right being questioned so far as appears, taken in connection with the conveyance by the plaintiff of the four lots to Cook, in part execution of the agreement, must, we think, be regarded as such acts of part performance as to take the case out of the statute of frauds, and justify the court in decreeing a conveyance of the premises to the defendant Babcock. Part performance of a parol contract is allowed to take it out of the statute and justify a decree for its specific performance, upon the ground that it would be inequitable and a fraud upon the part of the one insisting upon the statute, if, having by his acts induced his adversary to do acts on his part in part performance of the contract, and upon the faith of its further performance by both parties, and for which he cannot well be compensated, except by a specific performance of the agreement, he shall be allowed to repudiate and refuse to perform it on his part. The act or acts of part performance, to have this effect, must be referable to the parol agreement, be in part execution of it, and not be referable to another title, and be an act prejudicial to the party claiming specific performance, and for which he can have no adequate compensation in damages, if the agreement be not enforced. Possession, more frequently relied on than any other, is an act of part performance as to both parties to the agreement, in that the owner has allowed the other party to do an act on the faith of the contract, namely, to take and hold possession of the land, which would otherwise be wrongful, and would render him a trespasser, and he, on his part, has withdrawn from the land, and acquiesced in the possession of the other party as rightful. They are therefore both bound: Fry on Specific Performance, secs. 575-579; Waterman on Specific Performance, secs. 260-263. The possession, in some cases, may be of an equivocal character, as where a tenant under a lease is already in possession, but holds over and enters into a parol agreement to purchase, in which case, it is said, his existing and continued possession will be referable to the lease, and not to the parol agreement. But in other cases it has been held that the possession of the tenant after the expiration of the lease, where there has been a parol agreement for a renewal, is referable only to the contract for renewal, and is part performance of such contract: Fry on Specific Performance, secs. 575-579, and cases there cited. And the general rule is, that the possession, to be available as

an act of part performance, must not be merely the continuance of a previous possession, but one given and taken under and in consequence of the parol contract. But this rule is subject to exceptions. A wrongful possession will not be sufficient, but where possession has been taken without consent, or an existing possession has been retained, if the owner has afterwards allowed the party to remain in possession, this, it seems, will amount to an act of part performance of a parol agreement to convey.

In *Fisher v. Moolick*, 13 Wis. 322, where one, who was already in possession under a pre-emption claim, entered into a parol agreement with another to enter the land for him which he was so occupying, and to convey it to him on the payment of a certain price, the continued possession of such party, with the knowledge and consent of the person with whom he contracted, was held an act of part performance sufficient to take the case out of the statute of frauds. And in *Lincoln v. Wright*, 4 De Gex & J. 16-20, a case where a mortgagee with a power of sale sold the mortgaged premises, then in the possession of the mortgagor, and it was verbally agreed, in substance, that another should buy it on behalf of the mortgagor for a certain sum, and that the mortgagor should pay interest and continue to occupy the premises, it was held that his continued occupation, after the conveyance which extinguished his title, was referable only to the verbal agreement, and amounted to part performance of that agreement, and excluded the operation of the statute.

The continued possession of the premises in question, under a claim of title thereto, by Babcock, for a period of seventeen years between the mortgage sale and the bringing of this action, presumptively with the knowledge and acquiescence of the plaintiff, must, we think, be regarded as referable only to the parol agreement. The foreclosure proceedings had extinguished the title and vested it in the plaintiff, and Babcock's possession during all this long period of time can, we think, be referable only to the parol agreement in question, and must be held sufficient to take it out of the operation of the statute. An agreement by one person to purchase land for another, and the purchase of the same accordingly, under circumstances which would amount to a fraud upon the latter if the former were allowed to repudiate his promise, is not within the statute. The purchaser cannot, in such case, be allowed to adopt and use the agreement by which he obtained

title, and repudiate its conditions, by which he was to convey it, in execution of the contract, to the other party. In this case, the agreement between the plaintiff and defendant Babcock, that the plaintiff should purchase the lots at the sheriff's sale under the foreclosure judgment, and acquire a sheriff's deed thereto, was equivalent to a stipulation on the part of Babcock that he would do nothing to prevent the plaintiff from performing his part of the agreement and obtaining title by means of the foreclosure and sale, as a means of accomplishing the purpose in view, namely, perfecting the title to the lots, and was a renunciation on the part of Babcock of his right, by litigation in the foreclosure suit, or by bidding at the sale, to protect his rights and interests by any other means than those provided for by the agreement. Having thus enabled the plaintiff to acquire title to the property under the agreement in question, it would be a fraud on the defendant Babcock if the plaintiff were now permitted to repudiate his promise and obligation to convey according to its terms.

The case, in principle, is identical, we think, with those of *Paine v. Wilcox*, 16 Wis. 202-217, *Daniels v. Lewis*, 16 Wis. 142, and *Horn v. Ludington*, 32 Wis. 73. In the former case, a somewhat similar arrangement existed, where a party permitted a sheriff's sale to take place, which he might have prevented by further litigation, upon the faith of an oral agreement that the purchaser should reconvey to him or to his use, upon certain terms, under which the sale was allowed to take place; and it was held that "whenever a party so circumstanced is also in a condition to prevent a sale by further litigation, and he makes an agreement with the adverse party by which the sale is allowed to take place for the purpose of passing the title to a particular person, who is to hold it as security or reconvey it upon certain terms, that it might operate as the grossest fraud upon him if the one who had thus obtained the title might then repudiate the agreement and assume the character only of a general purchaser at a judicial sale. A judicial sale proceeds altogether *in invitum*. Each party stands upon his own rights, and neither is thrown off his guard or induced to neglect any steps to protect himself. But where such sale is allowed to take place for the purpose of executing an amicable arrangement, the most valuable interests might be sacrificed if the party thus getting the title could ignore the agreement and insist on being regarded only

as a hostile purchaser. To get a title by means of such an agreement, used to throw the owner off his guard and induce him to abandon his litigation, and deliver himself defenseless in the hands of his enemy, and then claim to hold as though the sale had been entirely adverse, without any such agreement, is an obvious fraud." And this was so held, on account of the impossibility of restoring a party, who has so far performed his part of the agreement, to his former position, and that his rights can only be preserved by enforcing the agreement on the faith of which he acted. The plaintiff's conduct, after having obtained the title in the manner and for the purpose stated, is clearly fraudulent as against the defendant Babcock, and entitles him to a decree for a conveyance of the property.

Nor is it necessary to rest the right of the defendant Babcock solely on the power of a court of equity to compel the plaintiff to specifically perform his part of the agreement by conveying the lots in question to the defendant. The relief sought may well be rested on the jurisdiction of the court on the ground of fraud by holding the plaintiff liable to convey as a trustee *ex maleficio*. The defendant, relying upon the promise of the plaintiff to convey to him and thus protect his interests, was induced to refrain from taking any other steps for that purpose, either by litigation or by bidding at the sale, and from which he was, by the terms and purpose of the agreement, precluded. The plaintiff was thus enabled to take to himself the legal title, in order that it might be perfected and conveyed to the defendant, and it will operate as a surprise and fraud on the defendant, if the plaintiff is allowed to repudiate his obligation to convey to the defendant and carry out the agreement. The facts of the case justify the belief that, after having made the agreement, the plaintiff perceived his advantage growing out of the confidence created by it, and did not hesitate to use it in order to accomplish the result before us, namely, the acquisition by those means of the legal title, and the subsequent betrayal of the confidence reposed in him, by insisting on the statute of frauds as a means of holding these two lots without having paid or agreed to pay any consideration whatever for them. As against conduct so grossly fraudulent, the defendant is entitled to relief. In *Eldredge v. Jenkins*, 3 Story, 290, Judge Story held that "the rule in equity always has been that the statute is not allowed to operate as a protection for a fraud, or as a means of se-

ducing the unwary into a false confidence, whereby their intentions are thwarted on their interests are betrayed." And in *Lincoln v. Wright*, 4 De Gex & J. 22, Turner, L. J., held that the case there before the court needed not the aid of possession as part performance of the agreement, but that the case was one, not of mere trust, but of equitable fraud; that a party could not be allowed to adopt one part of the transaction and repudiate the other. This view of the case is vigorously maintained by *Brook v. Chappell*, 34 Wis. 413-418; and by *Laing v. McKee*, 13 Mich. 124; 87 Am. Dec. 738; *Beegle v. Wentz*, 55 Pa. St. 374; 93 Am. Dec. 762; *Faust v. Haas*, 78 Pa. St. 300, 301; *Boynston v. Housler*, 73 Pa. St. 453. In *Wolford v. Herrington*, 74 Pa. St. 311-313, 15 Am. Rep. 548, it was held that if one having an interest in land is induced to confide in the verbal promise of another that he will purchase it at sheriff's sale for the benefit of the former, and in consequence the other is allowed to obtain the legal title, his denial of the confidence is such a fraud as will make him a trustee *ex maleficio*. The distinction upon which cases such as this have been made to turn is as between one having an interest in the premises to protect by the parol agreement and a mere stranger to the title and estate seeking to enforce such an agreement. That under the facts found the plaintiff ought to be held a trustee *ex maleficio* for the defendant Babcock is maintained in *Arnold v. Cord*, 16 Ind. 177; *Teague v. Fowler*, 56 Ind. 569; *Hunt v. Elliott*, 80 Ind. 258; 41 Am. Rep. 794; *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; *Morey v. Herrick*, 18 Pa. St. 128, 129; and *Ross v. Bates*, 12 Mo. 30-51.

We are of the opinion that the defendants are entitled to judgment in their favor, and that the defendant Babcock is entitled to the relief prayed in his counterclaim.

By the COURT. The judgment of the superior court of Milwaukee County in favor of the plaintiff is reversed, and the cause is remanded to that court, with directions to grant the defendant Babcock the relief prayed for in his counterclaim.

STATUTE OF FRAUDS—POSSESSION, WHEN AN ACT OF PART PERFORMANCE. — Possession of land by the vendee, taken with the consent of the vendor, and under a parol contract to convey, will take the case out of the statute of frauds, and authorize compulsory specific performance, only when the taking of possession is pursuant to and referable solely to the parol contract: *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769, and note. Delivery of possession and the making of valuable improvements are essential to

sustain an action for specific performance of a parol contract for the conveyance of lands: *Moulton v. Harris*, 94 Cal. 420; *Ford v. Steele*, 31 Neb. 521; *Taylor v. Von Schraeder*, 107 Mo. 206. The payment of part or the whole of the purchase-money is not sufficient part performance to authorize the specific enforcement of an oral agreement to convey land: See authorities collected in note to *Townsend v. Houston*, 27 Am. Dec. 745; *Salfeld v. Sutter County Land Imp. etc. Co.*, 94 Cal. 546. Where the vendee under a parol contract has entered and made improvements, the vendor will not be permitted to evict him until the purchase-money has been repaid and compensation given for the betterments: *Vann v. Newcom*, 110 N. C. 122. And where, at the time of the purchase, the vendee has gone into the possession of the land and right of way, and so remained for seven years or more, whether or not a bill for specific performance is barred by the statute of limitations, a decree may be entered enjoining the vendor from interfering with the right of way: *Russell v. Napier*, 80 Ga. 77.

TRUSTEE EX MALEFICIO, WHAT ACTS WILL MAKE A PERSON: See notes to *Piper v. Hoard*, 1 Am. St. Rep. 798, and *Salsbury v. Black*, 4 Am. St. Rep. 634. A grantee who obtains an absolute deed by means of parol promise to reconvey, made without any intention of performing it, cannot interpose the statute of frauds as a defense to an action to declare a constructive trust on the land: *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189. So if land be conveyed to one under a parol trust invalid by the statute of frauds, the terms of which were that he should hold such land and sell it and pay the proceeds to a particular person, and he in fact accepts the conveyance, and sells the land, and thus executes such trust, he will not be permitted to retain the proceeds, but may be compelled to pay them as he promised to do: *Berk v. Martin*, 132 N. Y. 280; 28 Am. St. Rep. 570. The general rule is, that trusts in real property arising from fraud, actual or constructive, are not within that part of the statute of frauds which requires the trust to be declared by a writing, but they may be proved by parol evidence: *Hays v. Gloster*, 88 Cal. 560.

HARRIS v. CAMERON.

[81 WISCONSIN, 282.]

EVIDENCE — JUDICIAL NOTICE. — The court can take judicial notice of the uses of an air-gun which is of the kind usually kept for sale by toy and hardware merchants, to be sold as a toy to be used by boys.

NEGLECTOR. — A PARENT IS NOT GUILTY OF NEGLIGENCE PER SE in buying and giving to his son, eleven years of age, an air-gun of the kind commonly used by boys as a toy, and shooting with force sufficient to kill or wound a small bird, or dent a board, or destroy the eye of a human being; and such parent cannot be held answerable because his son loaned the gun to another boy, who shot at plaintiff and struck him in the eye, destroying that organ.

NEGLECTOR, WHEN A QUESTION FOR THE COURT. — If the evidence in a cause is plain and positive, admitting of no doubt or controversy, the question of negligence is for the court as a question of law.

ACTION to recover for personal injuries alleged to have resulted to the plaintiff from the negligence of the defendant.

The court directed a judgment of nonsuit to be entered, and the plaintiff appealed therefrom.

F. W. Houghton and George G. Greene, for the appellant.

Phillips and Kleist, and Gabe Bouck, for the respondent.

ORTON, J. The facts of this case, so far as necessary to make the decision intelligible, are substantially as follows: Some time prior to the fifth day of October, 1889, the defendant, a resident of the city of Oshkosh, and the father of the boy Robbie Cameron, of the age of about eleven years, bought at the hardware-store of Webb and Rundles, in said city, for his son Robbie, a metallic air-gun, called the "Daisy Air-gun," to replace a wooden air-gun that Robbie had formerly had and used; and Robbie had played with and used this air-gun to shoot at a mark, and perhaps small birds, about his home and in the neighborhood, for some time. On the date aforesaid, two neighboring boys, Bud Thompson, about the age of nine years, and Byron Harris, the plaintiff, of about the age of fourteen years, who, with Robbie, had been in the habit of visiting and playing with each other, came to play with Robbie at his home, — Byron on stilts, and Bud on a safety bicycle. Robbie was playing with his air-gun, and Bud let Robbie use his "safety" in exchange for the gun. Bud fired it several times, and finally aimed it at Byron, who said, "Stop; don't!" Bud then rested the gun on a board, a part of a grape-trellis, and aimed it again at Byron, who tried to move out of the way a little on his stilts, and Bud fired, and shot Byron in the left eye, by which it was destroyed. This kind of air-gun was usually loaded with BB shot, and the defendant bought his son Robbie a quantity of such shot, to be used with the gun. Robbie had played with other boys in the neighborhood with his gun, and other boys had used it. This kind of gun would shoot strong enough, near by, to kill or wound a small bird, or dent a board, and, as we know, destroy an eye.

This court can take judicial knowledge of the nature and uses of this air-gun, as it can of "beer": *Briffitt v. State*, 58 Wis. 39; 46 Am. Rep. 621; or of "gas": *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539; 70 Am. Dec. 479; or of an express or freight "car": *Nicholls v. State*, 68 Wis. 416; 60 Am. Rep. 870. It may be properly said, both from the evidence and common knowledge, that this kind of air-gun was often kept for sale

by toy and hardware merchants; and, if not generally, was much used by boys about the ages of these three boys, in the villages and cities of this state. And it may also be said that this kind of gun was manufactured as a toy; sold, bought, and generally used as a toy, and harmlessly. It is so generally known that a particular description of it is not necessary. The power is air-pressure, which is forced into a small space in the small barrel by a plunger; and by a movement of the trigger the compressed air escapes outwardly, and forces out the shot with considerable force.

It should be said that the boy Bud Thompson did not intend to shoot Byron in the eye or face. Discharged against the clothing, it would have been harmless, and so he probably intended. Whatever may be said of the continuity of dependent causes which connect the defendant with this act of the boy Bud Thompson, it was an act of carelessness on the part of this boy who did the shooting. He aimed at Byron and intended to shoot him in some place, and it is questionable whether he is not primarily and independently liable to the plaintiff for the injury. But this action is brought against George H. Cameron, the father of the boy Robbie, who loaned the gun to Bud Thompson; and he is sought to be held liable for the injury, on the ground of his negligence in buying the gun for Robbie, his son. After a fair and full trial of the case, the court, on motion of the defendant, granted a nonsuit, and from this judgment this appeal is taken.

This case presents very important and unusual questions of law in connection with the facts, and they have been presented to this court and discussed by eminent counsel on both sides with great learning and ability. The two main questions are: 1. Was the defendant guilty of an act of culpable negligence *per se* in buying this air-gun for his boy? 2. If so, could he have reasonably anticipated or expected such a dangerous and improper use of it by the boy Bud Thompson? If it is held that the defendant was not guilty of an act of negligence *per se* in so buying the gun, then it becomes necessary to decide the second question.

We are clearly satisfied that it was not an act of culpable negligence on the part of the defendant. The act or fact must be such that the negligence can be directly and logically inferred from it: *Wood v. Chicago etc. R'y Co.*, 51 Wis. 196. The defendant's negligence must be proved, and cannot be presumed: *Chamberlain v. Milwaukee etc. R. R. Co.*, 7 Wis. 425;

Steffen v. Chicago etc. R'y Co., 46 Wis. 259; *Denby v. Willer*, 59 Wis. 240. The defendant's negligence in buying this article for his son and giving it to him to use must mainly depend upon the nature and uses of the thing itself. What is it? It is called an "air-gun." A gun, in the usual sense, is a "weapon which throws a projectile or missile to a distance; a fire-arm for throwing a projectile with gunpowder." A weapon is "an instrument of offensive or defensive combat; something to fight with": Webster's Dict. A fire-arm is a "weapon which acts by the force of gunpowder": Webster's Dict. Our statute (sec. 1, c. 116, Laws of 1882, and sec. 2, c. 329, Laws of 1883) provides: "It shall be unlawful for any person to sell or use, or have in his possession for the purpose of exposing for sale or use, any toy pistol, toy revolver, or other fire-arm." "It shall be unlawful for any dealer in pistols or revolvers, or any other person, to sell, loan, or give any pistol or revolver to any minor in this state." These prohibited pistols or revolvers must be fire-arms, — that is, "weapons which act by the force of gunpowder." The air gun or pistol is not prohibited. This air-gun is not a gun or a weapon in the above signification of the words; but called a "gun," imitative only of a real gun, to give it dignity to a boy, or to play soldier with. The bow and arrow, when put in the form of a cross-bow, is called a "cross-gun," — a plaything for boys. One of these will put out an eye, if so aimed; and so, too, as to many toys and playthings, perfectly harmless and inoffensive in themselves, but whose common use can be perverted into a dangerous use by design. There are very few of the most harmless toys which cannot be used to the injury of another. A pocket-knife, that a boy must have to whittle and make things with, may become, in the hand of a bad boy, a most dangerous instrument of wrong and injury. Every boy over the age of six years or less must have a "ball-club"; and a boy of ten or more can with it knock out an eye or the teeth, or crush in the skull of another boy; and a hard "regulation ball" may put out an eye. Many of the toys for a baby may be used for injury.

In all of these cases, the thing in itself, and when used in the manner and for the purposes for which it was made, and when put to its ordinary or common use, is harmless, and yet may be used exceptionally for personal injury. It is easy to convert almost any good thing into an evil by improper use. What shall we say, then, of this toy gun? It is not danger-

ous in itself, and was not intended to be dangerous or to do mischief. It was designed for a mere toy or plaything for boys. It is commonly used as a toy and plaything by boys. The defendant bought it as a plaything for his boy. It is presumed that he bought it to be used in the natural and common way. He had no reason to expect that it would ever be used to shoot a boy's eye out. He is only responsible for the consequences which naturally, commonly, and reasonably follow its proper and natural use. He had no reason to expect that any boy would ever aim it at the face of another boy. To hold the defendant negligent in buying this toy gun, and that from the character of the thing itself, and from his having reasonably expected therefrom that this mischief would occur, would open an almost limitless field of liability in respect to all toys and playthings for boys, purchased with the same harmless intention. This toy gun was made for such boys, and is commonly used by them by common consent. Is it a sufficient test of its dangerous character that it has once been used in this improper way, when in all the other numberless instances of its use it has been used only for innocent amusement, as it was intended to be?

In any view that can be taken of this device as a toy or plaything, but which can possibly be put to a dangerous use, it would be illogical and unreasonable to hold that the defendant was guilty of culpable negligence in buying it for his boy, and ought to have reasonably expected that such an unusual and extraordinary consequence would follow it. He is only chargeable with ordinary care, such as fathers generally would exercise under like circumstances: *Parish v. Eden*, 62 Wis. 272. It was held in *Hagerty v. Powers*, 66 Cal. 368, 56 Am. Rep. 101, that the father was not liable for giving his eleven-year-old boy a loaded pistol to play with, and an accident happened by the boy's careless use of it. The court said in that case that "we have been cited to no case controlled by the principles of the common law that holds that the action, under such circumstances, can be maintained." In that case it was a loaded pistol; in this, a toy gun. In that case the defendant's son did the mischief; in this, the defendant's boy did no harm with it. In *Chaddock v. Plummer*, 88 Mich. 225, 26 Am. St. Rep. 283, the defendant bought a similar air-gun, with similar shot, for his nine-year-old boy, and another boy found it in a storm-door, and the defendant's wife gave the boy some shot, and in firing it at a board

on a frequented street, the shot glanced, and put out the plaintiff's eye. The court held "that it was not negligence *per se* for the defendant to buy this toy gun and place it in the hands of his boy, nine years of age." In *Poland v. Earhart*, 70 Iowa, 285, a store-keeper sold a revolver to a minor fifteen years of age, who accidentally fired it and injured himself. The father of the boy sued the store-keeper; and it was held that he could not recover, as the accident could not have been reasonably anticipated.

It is sufficient for this case that it would not have been negligence if the defendant's own son had committed the act, because he could not have reasonably anticipated or expected such a result. We will not, therefore, consider whether there was not the intervention of a new and independent cause for the injury in another boy committing the act. If he could have reasonably expected such a result, it must have been from the nature and character of this toy gun alone, for there was nothing else proved on which to predicate such an expectation. The question is, whether the defendant was guilty of negligence in so buying the gun for his boy, not having any reasonable expectation of any such result. We have shown that the negligence of the defendant could not be inferred, — 1. From the nature of the air-gun itself; and 2. From the fact that he ought to have reasonably expected such a result. His negligence cannot be inferred from what he did, or from any of the reasonably expected consequences of it.

The learned counsel of the appellant have not been able to find any case that bears any close analogy to this, where negligence of the defendant could be imputed under such circumstances. They, however, urge most vigorously, and cite many authorities to the point, that defendant's negligence in such cases is a question for the jury, and not for the court. That would be so where the question depended upon many facts and circumstances from which different persons might reasonably draw different inferences or conclusions. But where the evidence, as in this case, is plain and positive, and admits of no doubt or controversy, the question of negligence is for the court, as a question of law: *Jalis v. Cardinal*, 35 Wis. 118. The facts in the case are not controverted. The whole case depends upon questions of law alone. There is nothing for the jury to find but legal conclusions and the amount of damages. Where, as here, the facts are undisputed, and there is no reasonable chance for drawing different

conclusions from them, the question of negligence becomes one of law for the court: *Elmore v. Hill*, 51 Wis. 365; see other authorities cited in respondent's brief. We are most clearly satisfied that it was the duty of the court to order a nonsuit in this case.

By the COURT. The judgment of the circuit court is affirmed.

JUDICIAL NOTICE: See notes to *Snider v. State*, 12 Am. St. Rep. 353; *City Council v. O'Donnell*, 13 Am. St. Rep. 738; *Wilson v. Van Leer*, 14 Am. St. Rep. 859. The courts will take judicial notice that lager beer, ale, porter, and any other liquor made of malt is a malt liquor: *Netsu v. State*, 24 Fla. 336. On the other hand, judicial notice will not be taken that "Calcutta fish-poles" are perishable property, or that they would undergo a change of condition for better or worse in nine months: *Imbrie v. Wetherbee*, 70 Mich. 103; nor that "the foot-board in front of a shifting-engine is the post of duty of the yard-master and conductor": *Highland Ave. etc. R. R. Co. v. Walters*, 91 Ala. 435; nor that the employment of a high-priced broker is necessary, or proper, or usual in the ordinary course of business to get a contractor to enter into a contract for building a flume: *Harris v. San Diego Flume Co.*, 87 Cal. 526; nor that dry, fine coal-dust is a dangerous element in a coal mine: *Oherokee etc. Coal etc. Co. v. Wilson*, 47 Kan. 460.

NEGLIGENCE PER SE, WHAT IS NOT. — Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis on which to predicate a wrong: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193. Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong: See note to *Mahogany v. Ward*, 27 Am. St. Rep. 758.

LIABILITY OF PARENT FOR TORTS OF CHILD: See *Smith v. Davenport*, 45 Kan. 423; 23 Am. St. Rep. 737, and note.

NEGLIGENCE. — Province of court and jury: See note to *Carter v. Oliver Oil Co.*, 27 Am. St. Rep. 819. The general rule is, that when the facts are ascertained, what is negligence is a question of law for the court: See cases cited in above note. When the evidence is conflicting, the court should instruct the jury that it is or is not negligence, according as they may find the facts to exist: *Knight v. Albemarle etc. R. R. Co.*, 110 N. C. 58; and if the evidence is conflicting, it is error to grant a nonsuit: *Noyes v. Southern Pac. R. R. Co.*, 92 Cal. 285.

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CHASE v. CITY OF OSHKOSH.

[81 WISCONSIN, 313.]

MUNICIPAL CORPORATIONS — STREETS, CONTROL OF. — As against a lot-owner, though he holds the fee of the streets subject to the public easement therein, a city has an undoubted right to open and fit for use and travel a street over which the public easement extends to its entire width, and whether it shall be so opened and improved is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed, and with this discretion the courts will not ordinarily interfere.

MUNICIPAL CORPORATIONS — STREETS — ESTOPPEL. — The fact that an obstruction has been permitted to remain in a public street for a long time without objection, or that the street has never been used as such, cannot estop the public authorities from removing such obstruction and opening and fitting the street for public use to its entire width.

MUNICIPAL CORPORATIONS — STREETS. — SHADE-TREES STANDING IN A PUBLIC STREET, near the line of the sidewalk, may be cut down and removed by the municipal officers in pursuance of the authority which the city possesses over its streets and sidewalks; and no action can be maintained by the owners of the trees on account thereof. Whether the trees are obstructions to travel, and ought to be removed to make the sidewalk reasonably safe therefor, is a matter within the *quasi* legislative discretion conferred on the common council of a municipality, when its charter gives such council power to prevent the encumbering of the sidewalks, and to control and regulate the streets, and to remove and abate every obstruction and encroachment thereon.

STREETS AND HIGHWAYS. — AN ENCROACHMENT is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights of possession of another.

STREETS AND HIGHWAYS. — AN OBSTRUCTION is a **BLOCKING UP**; filling with obstacles or impediments; impeding, embarrassing, or opposing the passage along and over the street. And to constitute it such, it need not be such as to stop travel.

STREETS AND HIGHWAYS. — A PERMANENT OBSTRUCTION, SUCH AS TREES, standing within a sidewalk or traveled street, constitutes *per se* a public nuisance, which may be summarily removed by direction of the common council of a municipality.

ACTION by plaintiffs to recover damages for the wrongful cutting down and removing of ornamental shade-trees standing on plaintiffs' premises in the city of Oshkosh, but in a public street, inside of the street line of the sidewalk, and next to the carriage-way. It was claimed on the part of the plaintiffs that the trees did not delay or obstruct travel, and that they were removed without giving previous notice to the plaintiffs to remove them, and that the cutting down and removal of them constituted a taking of the plaintiffs' property without due process of law. There was no doubt that the

trees were cut down and removed by officers of the defendant, acting under the resolution and authority of its common council, the members of which all testified at the trial that in their judgment the interests of the city required the removal of the trees, and that frequent complaints had been made to them during a period of two years about the trees. The defendant requested the court to instruct the jury that it was "the duty of the city to keep its streets and sidewalks at all times open and free for the use of persons traveling over and along the same, over the entire width of the street, and failure to so keep the streets and sidewalks free from obstruction would render the city liable for injury occasioned thereby," and that it was "made the duty of the aldermen, and they had the power and right, without notice, to remove any obstruction from the streets and sidewalks"; but the court refused to give either of these instructions. These questions were submitted to the jury: 1. "Did said trees incommode or hinder the public use and enjoyment of said street or sidewalk?" 2. "Did said trees injure said street or sidewalk, or interfere with travel?" The jury were charged that in forming their answer to the first question they "must consider only ordinary and reasonable use and enjoyment of the street by the public, and must exclude any incidental inconvenience necessarily accompanying the keeping of shade-trees; and if the jury find that the shade-trees put the public to only those inconveniences necessarily accompanying shade-trees, and did not deprive it of any substantial or necessary use or enjoyment of the street or sidewalk, then the jury must answer the first question in the negative." Both questions were answered in the negative by the jury, who returned a verdict in favor of the plaintiffs for eleven hundred dollars, three hundred dollars of which were subsequently remitted by the plaintiffs upon the order of the court, and a judgment was entered in their favor for eight hundred dollars, from which defendant appealed.

H. I. Weed, for the appellant.

Finch and Barber, Henry Barber, and F. Beglinger, for the respondents.

PINNEY, J. In the case of *Kimball v. Kenosha*, 4 Wis. 821, it is decided that the grantee of a lot bounded by a street or streets in a village platted and laid out in conformity with the statute takes to the center of the street on which the lot

abuts, subject to the public easement; and this proposition has been repeatedly affirmed in numerous subsequent cases, some of which are cited in *Andrews v. Youmans*, 78 Wis. 58. The right of the public to use the street for purposes of travel extends to the portion set apart or used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot-owner abuts. As against the lot-owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to its entire width; and whether it will so open and improve it, or whether it should be so opened or improved, is a matter of discretion to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities, courts cannot ordinarily interfere upon the complaint of a lot-owner so long as the easement continues to exist; and no mere non-user, however long continued, will operate as an abandonment of the public right, even though, until needed for a public use, the authorities should treat the street as the property of the owner of the lot. The public authorities, representing its interests, will not be thereby estopped from removing obstructions therefrom and opening and fitting it for public use to its entire width: *State v. Leaver*, 62 Wis. 387; *Reilly v. Racine*, 51 Wis. 526; *Childs v. Nelson*, 69 Wis. 125. The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion: *Benson v. Waukesha*, 74 Wis. 31-39; *Wright v. Forrestal*, 65 Wis. 341; *Pontiac v. Carter*, 82 Mich. 164; *Brush v. Carbondale*, 78 Ill. 74.

It necessarily follows, that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner no action can be maintained against the city: *Alexander v. Milwaukee*, 16 Wis. 247. It may well be that had the trees in question been cut down or removed by some third party, not acting under proper authority from the city, he would have been held liable to the plaintiffs in an action for trespass; and it was so held in *Andrews v. Youmans*, 78 Wis. 58. But this does not tend to show that this action can be maintained for cutting and removing them under the authority of the common council given by resolution to the alder-

men of the ward, standing, as they did, within the sidewalk, even without notice to the lot-owner. There was testimony that plaintiffs had been notified to remove the trees, and they had failed to do so. Complaint had been made for two years previously, to the aldermen of that ward, that the trees were obstructions to the sidewalk; and it is not contended but that they were cut down in good faith and in pursuance of the authority which the city possesses over its streets and sidewalks. It was admitted at the trial that the trees were cut down by parties acting in good faith under the authority of the city and without malice.

It was the duty of the city to keep its streets and sidewalks free and clear of obstructions for the use of persons traveling over and along the same; and there can be no doubt but that the city would have been liable in damages to any person traveling along and over the walk in question, in the nighttime, who, without fault on his part, had been injured by running against these trees situated within the limits of the walk. There can be no doubt but that the common council had the right, therefore, to treat them as obstructions to the public travel, and a nuisance, and to abate the nuisance in the manner they did, to protect the public in the lawful use of the sidewalk, and the city from liability for injuries which might be sustained by persons passing along and over it, and who might be injured by such obstructions. Whether the trees were obstructions to travel, and ought to be removed in order to make the sidewalk reasonably safe for travel, was, we think, a matter within the *quasi* legislative discretion conferred on the common council by the city charter. The charter of the city gives the common council, under various subdivisions of sec. 3, subc. 6, c. 183, Laws of 1883, power, by ordinance, resolution, or by-law, when it deems it expedient, "to prevent the encumbering of the streets and sidewalks," and to "control and regulate the streets, . . . and to remove and abate any obstructions and encroachments therein," and to "protect the same from any encroachment or injury," and "to prevent, prohibit, and cause the removal of all obstructions in and upon all streets in said city"; and the provisions of chapter 52 of the Revised Statutes on the subject of encroachments and obstructions on streets and highways, are not applicable, because special provisions are made in the charter of the city of Oshkosh inconsistent therewith (Rev. Stats., sec. 1347); and by the charter of the city it is provided

that "no general law of this state contravening the provisions of the charter shall be considered as repealing, annulling, or modifying the same, unless such purpose be expressly set forth in such law as an amendment of this charter": Laws of 1883, c. 183, subc. 14, sec. 25; and this provision was in force when the present revision of the statutes was adopted: Laws of 1877, c. 123, subc. 13, sec. 25. Similar provisions have existed in the various charters of cities in this state from an early day.

Inasmuch as the discretion and judgment of the common council in respect to these matters cannot be revised by the court or jury, there being no evidence tending to show an abuse of it, the court ought not to have submitted it to the jury to find whether,—“1. Did said trees incommode or hinder the public use and enjoyment of said street or sidewalk? 2. Did said trees injure said street or sidewalk, or interfere with travel?” It was not seriously contended on the part of the plaintiffs but that the city authorities might authorize the removal of the trees; but it was claimed that they constituted an encroachment, and were not obstructions to the walk or street, and that they could not be removed without a hearing on notice. An encroachment is a gradual entering on and taking possession by one of what is not his own; the unlawful gaining upon the rights or possessions of another. The fencing in or inclosing of a portion of a street or highway by a fence or wall, or the occupancy of it, would be an encroachment; and as there may be uncertainty as to the exact line of the street or highway, it may be necessary, in order to remove it, that notice be given, so that the question of encroachment may be first passed upon by a jury. An obstruction is a blocking up; filling with obstacles or impediments; an impeding, embarrassing, or opposing the passage along and over the street. And to constitute it such, it need not be such as to stop travel. The provisions in the city charter on the subject of encroachments and obstructions of streets and sidewalks give very extensive and comprehensive powers to the common council of a *quasi* legislative character, but without any particular directions as to the manner of their exercise; and these powers are peculiarly adapted to the needs of a growing and populous village or city. They are not only very comprehensive and far-reaching, but they clearly extend to the cutting down and removal of the trees in the manner adopted in the present instance, as they were

manifestly obstructions to the sidewalk, although room was left on the walk for foot-travel to pass. It was not necessary, in order that they should constitute an obstruction so as to authorize their removal, that they should interrupt or stop travel. The case of *State v. Leaver*, 62 Wis. 392, is decisive on this subject. It surely cannot be maintained that the plaintiffs have the right to plant and maintain other trees in their place within the sidewalk, or that other lot-owners can plant in like manner and maintain trees thus situated.

As already stated, the plaintiffs had a right of property in the trees, in the sense that they might have cut or removed them, or maintained an action against any one who did so not acting under authority of the common council; but it does not follow that they had the right to keep and maintain them standing within the sidewalk, in defiance of the resolution of the common council insisting, in the interests of the public, on their removal. The case of *Pauer v. Albrecht*, 72 Wis. 416, is clearly not in point; for it was a case of an encroachment, and the charter did not contain provisions authorizing the removal of encroachments, and the proceedings had to be, if at all, under the general statute. A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitutes *per se* a public nuisance, and may be summarily removed by direction of the common council.

The circuit court, upon the entire case, ought to have directed a verdict for the defendant. For these reasons, and for error in refusing the instructions asked by the defendant, the judgment of the circuit court must be reversed.

By the COURT. — The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

STREETS AND HIGHWAYS. — The public acquires a mere right of passage over a highway. The freehold and all profits of the soil belong still to the proprietor from whom the right of passage was acquired, and he may make any use of his lands not inconsistent with the enjoyment of such right of passage: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908. Laying out of public streets creates two co-existent rights, — one belonging to the public, to use and improve them for ordinary purposes, the other belonging to the abutting owner, to have access to and from his property over them, and to make such use of them as is customary and reasonable: *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564.

TREES ON HIGHWAYS. — Adjacent land-owners may lawfully use the space between the carriage-way and the sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private

property specially protected by statute: *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536. The owner of land appropriated as a highway retains his exclusive right in trees and shrubs growing on the land so appropriated for every purpose not incompatible with the public right of way, and he may maintain an action against any individual who, not acting under statutory or official authority, destroys or removes the trees or shrubs standing or growing in the highway, unless they constitute an obstruction, hindrance, or annoyance to travelers: *Phifer v. Cox*, 21 Ohio St. 248; 8 Am. Rep. 58. Trees standing in a highway do not constitute a nuisance, unless they form an obstruction to travel: See cases cited in note to *Callanan v. Gilman*, 1 Am. St. Rep. 843.

HIGHWAYS — EFFECT OF NON-USER. — When a road has been duly dedicated by a land-owner, and the grantees have conformed their fences to the line of the proposed highway, the fact that public travel is almost exclusively, if not entirely, on the side of the road remote from the premises of one of such grantees does not show an abandonment of the public use of the road on the side next to his land, nor a failure of the public to accept and use the road as dedicated: *Southern Pac. R. R. Co. v. Ferris*, 93 Cal. 263. Nor will the fact that a road outside the traveled track is overgrown with brush deprive it of the character of a highway: *Grandville v. Jenison*, 84 Mich. 54; citing *Nye v. Clark*, 55 Mich. 599. And where there has not been an entire non-user of a portion of the road, the fact that most of the traffic was carried on over a shorter route, which left that portion on one side, will not constitute such a non-user as will prevent the running of the statute of limitations in favor of the public: *City of Beatrice v. Black*, 28 Neb. 263. On the other hand, a highway can be partially discontinued by non-user combined with long adverse possession, as where a road was never opened to its full width, and a strip of it was fenced and cultivated for thirty years by the adjoining land-owner: *Coleman v. Flint etc. R. R. Co.*, 64 Mich. 160; *Orr v. O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277. But the non-user will not affect the part in use: *Wayne Co. Sav. Bank v. Stockwell*, 84 Mich. 586; 22 Am. St. Rep. 708. On this subject, however, the authorities are in conflict, and the note to *Orr v. O'Brien*, 14 Am. St. Rep. 277, should be consulted.

MUNICIPAL CORPORATIONS — CONTROL OF STREETS. — The extent of control exercised by a municipal government over the streets is thus stated by the court in *Livingston v. Wolf*, 136 Pa. St. 519; 20 Am. St. Rep. 936: "The city or borough may decide when and where it will open streets, what shall be their width, and how much of that width shall be devoted to a carriage-way, and how much to foot-walks. It may say where trees shall be planted within the street limits, where and how hitching-posts shall be set, telegraph-poles erected, or passenger-railways built. Its decision in such matters may subject a few persons to some inconvenience, or possibly to some substantial loss, but it has the power to decide on such subjects. The foot-ways, no less than the carriage-ways, are under municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar-doors, door-steps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and laws. When so exercised, it is binding on all the inhabitants of the municipality"; citing numerous cases.

STEVENS v. QUEEN INSURANCE COMPANY.

[81 WISCONSIN, 335.]

INSURANCE. — A REPRESENTATION CONCERNING ENCUMBRANCES, contained in an application for insurance on property, is regarded as a warranty, and if substantially untrue, avoids the policy.

INSURANCE, ENTIRETY OF. — If a policy includes real property, and also personal property in the buildings thereon, the risk being distributed, — that is to say, certain sums on the buildings and certain other sums on the personal property therein, — a misrepresentation in respect to the buildings, and which avoids the insurance thereon, also avoids it as to the personal property. The contract of insurance in such case is entire, and there can be no recovery on personal property if there has been a material misrepresentation as to the buildings.

INSURANCE, NOTICE TO AGENT OF ENCUMBRANCES. — The fact that an agent of an insurance company, some months after the insurance was effected, negotiated a loan secured by a mortgage on the property insured, and witnessed the mortgage, and as notary public took the acknowledgment of it, does not constitute a waiver of the condition in the policy providing that it shall become void if there should be any mortgage on the property insured without the insurer giving notice to the company and obtaining consent therefor, when the policy also declares that no agent at the place of issue is authorized to alter its conditions, and it appears that the agent, at the time he negotiated the loan and witnessed the mortgage, did not have in his mind the fact that the property had been insured, and there is nothing to indicate that the company ever had notice of the mortgage until after the loss of the property by fire had occurred.

ACTION by the administrator of Greenberry Thompson to recover for the loss, by fire, of the property of his intestate, which had been insured against such loss by a policy issued by the defendant for the sum of \$2,000, as follows: \$200 on dwelling-house; \$150 on household furniture; \$25 on wearing apparel; \$50 on a cabinet organ; \$300 on frame barn and sheds; \$600 on hay and grain in such barn; \$525 on horses; \$25 on farming utensils; \$75 on mower and reaper; and \$50 on buggy. About ten months after the issuing of the policy, the assured mortgaged the premises on which the buildings were situated, to secure a loan of three thousand dollars, of which sum twelve hundred dollars were required to pay a pre-existing mortgage. The loan was negotiated, and the mortgage witnessed and its acknowledgment taken, by a local agent of the defendant, who had issued and countersigned the policy, but he testified that when negotiating the loan and witnessing and taking the acknowledgment to the mortgage, nothing was said about the policy of insurance, and that he did not associate in his mind the policy and the mortgage,

and that they were never so associated in his mind until after the loss had occurred and his attention had been called to the fact of the mortgage. The policy provided that if thereafter there should be any mortgage or other lien not consented to therein, the policy should be void, unless the insurer had obtained the written consent of the company; and the policy further stated that it should "not be valid unless countersigned by the duly authorized agent of the company at the place of issue, and no such agent is authorized to alter the above conditions." Though the company urged as a defense that it had not had any knowledge of nor consented to the mortgage executed after the policy was issued, the court decided the policy to be valid, and the plaintiff recovered judgment for his entire loss, from which the insurance company appealed.

Clark and Tayler, for the appellant.

Herman Buchner and T. L. Cleary, for the respondent.

PINNEY, J. The representation contained in the application of the insured for his policy as to encumbrances on the property is regarded as a warranty, and is material to the contract. Its purpose is to ascertain the amount of the interest of the insured in the property, as affecting the judgment of the insurer as to the character of the risk, by taking into consideration the motive which the insured may have in the preservation of the property. A statement on this subject, substantially untrue as to the amount of encumbrances, will avoid the policy: 2 May on Insurance, sec. 290; *Schumitsch v. American Ins. Co.*, 48 Wis. 26-29. Where the policy includes real property, and also personal property in buildings thereon, the risk being distributed,—that is to say, a certain sum on the buildings and a certain other sum on the personal property situated in such buildings, part of the realty,—a misrepresentation in respect to encumbrances which avoids the insurance as to the buildings avoids also the policy as to the personal property so insured. The contract of insurance in such cases is entire, and there can be no recovery for a loss of the personal property, if there has been a material misrepresentation in respect to the encumbrances on the buildings: *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Schumitsch v. American Ins. Co.*, 48 Wis. 26-29; *Loomis v. Rockford Ins. Co.*, 77 Wis. 89; 20 Am. St. Rep. 96.

The object of the provision in the policy by which it be-

comes void "if there shall now or hereafter be any mortgage not herein consented to, or if any other person shall now or hereafter have any interest in the premises, without the insured giving notice to the company and obtaining consent therefor as provided in the policy," is to secure to the insurer notice against any change in the amount of interest of the insured in the property, not consented to by the insurer, which may operate to diminish the motives of the insured to preserve it, or which may tend to expose it to danger from loss from incendiarism, and in order that the policy may be continued in force only in case the insurer shall consent to the altered circumstances affecting the risk. Such conditions in policies "are to secure risks in which there shall be no motive for intentional or dishonest loss": *Redmon v. Phoenix F. Ins. Co.*, 51 Wis. 301; 37 Am. Rep. 830; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1. If the mortgage in question had been on the property at the time Mr. Taylor, the local agent, issued the policy, and he had been informed of its existence, the fact that it had not been mentioned in the application for the policy filled out by him would not invalidate it: *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89-94; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479; *McBride v. Republic F. Ins. Co.*, 30 Wis. 567; *Wright v. Hartford F. Ins. Co.*, 36 Wis. 522; *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665. It is true that, under our statute (Rev. Stats., sec. 1977), whoever solicits insurance on behalf of any insurance company, or transmits an application to such company, or a policy to or from such corporation, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or transacts any business for such company, shall be deemed and held to be an agent for such company for all intents and purposes, but only in respect to each of the several matters mentioned. In this case an encumbrance for three thousand dollars was placed on the buildings insured about eleven months after the policy was issued; and this fact rendered the policy void, unless this encumbrance was consented to by the company, or the breach of the policy occasioned by the encumbrance was waived by it. It does not appear that Mr. Taylor did or said anything about the policy, or assumed to act for or represent the company in any respect concerning it, after he had issued it.

The plaintiff's counsel contended that inasmuch as Mr. Taylor, the agent of the company who issued the policy, nego-

tiated the loan of the three thousand dollars secured by the mortgage for the insured, and witnessed the mortgage and took the acknowledgment of it as a notary, and as he did not notify the assured that the policy was avoided by the mortgage, and did not return or offer to return the unearned portion of the premium, the company had therefore waived the forfeiture, and now that a loss has occurred, cannot be heard to insist upon it. The answer to this contention is found in the fact that by the terms of the policy Mr. Taylor, as local agent at the place of its issue, was not authorized to alter any of its conditions, and the insured is bound by this condition of the policy, and any attempted waiver by such agent merely by virtue of such agency, subsequent to the signing of the policy, is a nullity: *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, and numerous authorities there cited. Besides, there is no proof of any act or acts or declaration on the part of the agent, Taylor, from which such consent or waiver can be inferred. The agent testified that nothing was said by the insured when the mortgage was given about the policy; that it did not occur to him until after the fire, having passed out of his mind. There is nothing to show that the company ever had notice of the existence of the mortgage until after the loss. There is therefore no ground for claiming that the company ever consented to the mortgage, or waived the forfeiture caused by its execution. The case of *Bosworth v. Merchants' F. Ins. Co.*, 80 Wis. 393, and cases there cited, is decisive against the plaintiff. Cole, C. J., in that case, said that "the evidence of waiver of forfeiture ought to be reasonably clear and certain," and held the evidence in that case, which afforded some slight ground for the contention of waiver, entirely insufficient, and added that the proof of waiver in that case was no stronger than in *Engbretson v. Hekla F. Ins. Co.*, 58 Wis. 301, and *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198, and said: "We do not recollect any case, where the evidence of waiver was as weak and unsatisfactory as the one before us, where the company has been held liable."

Inasmuch as the policy was an entire and indivisible contract, the claim under it for the loss of personal property must share the same fate as that for the buildings in which it was required to be in order to be within the protection of the policy.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WHERE SEVERAL DIFFERENT HOUSES, situate on different farms, are insured in one policy, each for a separate amount, the policy stating the premium and the gross sum, the contract of insurance is regarded as divisible, so that if there is a breach of condition as to one of the houses, the policy is not thereby avoided as to the others: *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; 20 Am. St. Rep. 96. This case was again before the supreme court of the state, and the opinion of the court may be found in 81 Wis. 366. On the retrial of the case, after its first reversal, it was insisted by the counsel for the defendant that the opinion of the appellate court sanctioned "the introduction of testimony *abundant* the policy to show that the insured property belonged in different classes, upon which different rates of interest are charged; and that fact being proved, the legal inference therefrom is, that the premium named in the policy is an average one, or a compromise between higher and lower rates, which render the premium, and necessarily the risk also, entire and indivisible." The trial court accepted this construction of the opinion upon the former appeal, and admitted evidence in favor of the defendant to show that different rates of insurance were charged "by insurance companies, and that the premium expressed in the policy in suit was the average between higher and lower rates, which rendered the contract on insurance entire, and necessarily defeated the rule." The appellate court decided this action of the trial court to have been erroneous, and reversed the judgment in favor of the defendant, founded thereon, saying: "Whether parol testimony is admissible to show that a written contract which we have held to be on its face divisible is in fact indivisible because of an understanding between the parties when they made it, which is not expressed in the writing, was not determined or suggested on the former appeal, and will not be determined here. But it seems quite apparent that the admission of such testimony comes dangerously near violating the rule that parol testimony of antecedent negotiations or agreements is inadmissible to contradict or vary the terms of the written contract. If, without fraud, the writing fails to express the real agreement of the parties, the safer course is to apply to the court for a reformation thereof. In such a proceeding the parol testimony would be admissible."

INSURANCE — REPRESENTATIONS AS TO ENCUMBRANCES. — A policy of insurance is avoided by the existence of a mortgage on a part of the property insured, where the applicant represented that the property was free from encumbrance, and it was provided in the policy that it should become void should there be any material concealment: *Gould v. York County etc. Ins. Co.*, 47 Me. 403; 74 Am. Dec. 494, and note. A misrepresentation by the assured that the insured property is not encumbered, in answer to a direct question, will avoid the policy: *Clark v. New England etc. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44, and note; *Westchester etc. Ins. Co. v. Weaver*, 70 Md. 537. If the assured, in negotiating for a policy with an insurance company, truly stated the condition of the property and the encumbrances thereon, the company cannot avoid liability by those encumbrances being in contravention of the stipulations of the policy: *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551. As to when representations are warranties in contracts of insurance, see note to *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 320; extended note to *Burritt v. Saratoga etc. Ins. Co.*, 40 Am. Dec. 349. As to the distinction

between representations and warranties, see note to *Fowler v. Aetna etc. Ins. Co.*, 16 Am. Dec. 463.

INSURANCE — ENTIRETY OF CONTRACT. — A policy of insurance is void as to the goods as well as the store, where it is upon a store and goods, and the property was represented to be unencumbered, when in fact a mortgage existed upon the store: *Gould v. York County etc. Ins. Co.*, 47 Me. 403; 74 Am. Dec. 494, and extended note; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Mass. Sav. Bank v. Meriden etc. Ins. Co.*, 57 Conn. 335. Though insurance is distributed to the different items of insured property, the contract is indivisible if its breach as to one item of the property affects the other items by increasing the risk thereon: *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; 20 Am. St. Rep. 96, and note. The decisions maintaining the indivisibility of contracts of insurance upon separate and distinct parcels of property, while still in the majority, are not so decidedly so as formerly; on the contrary, the courts of several states have manifested a determination to treat such contracts as divisible, and to hold that a breach of condition as to one class of property does not necessarily terminate the contract as to other property respecting which no breach of condition has occurred: *Loomis v. Rockford Ins. Co.* 77 Wis. 87; 20 Am. St. Rep. 96; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *ante*, p. 459.

ABBOT v. McCADDEN.

[31 WISCONSIN, 562.]

RAILROADS — INJURY TO EMPLOYEE — EVIDENCE OF CONTRIBUTORY NEGLIGENCE. — When a railroad employee engaged in the company's yard is struck and killed by a switch-engine, alleged to have been running at an unlawful rate of speed at the time of the accident, evidence that it was the universal custom in that yard to run switch-engines faster than the lawful rate of speed, and that the deceased well knew it, is admissible on the question of his contributory negligence, in an action against the company to recover for the injury.

MASTER AND SERVANT — RISK ASSUMED BY SERVANT — CONTRIBUTORY NEGLIGENCE. — In an action to recover for the death of an employee, alleged to have been caused by the negligence of the master, the fact that such employee knew of the habitual use of his employer's machinery in a particularly dangerous and unlawful way, and remained in the service without objection, is evidence of contributory negligence on the part of the employee.

DAMAGES FOR DEATH CAUSED BY NEGLIGENCE — CHILDREN. — In an action to recover damages for the death of a married man, caused by the negligence of his employer, the fact that he left children surviving, whose support will be thrown upon his widow, may be shown in evidence and considered by the jury, but the damages recoverable are those which the widow has suffered alone, and not such as may have been suffered by "her and her children."

ACTION to recover damages for the death of A. D. McCadden, who was run over and killed by a switch-engine in the

yard of the Wisconsin Central Railroad Company. At the time of the accident, deceased was employed as a fireman on another switch-engine in said yard, and had left his engine and started across the yard to get his dinner. The remaining facts appear in the opinion.

Howard Morris and Thomas H. Gill, for the appellants.

G. W. Bird, and Lamoreux and Park, for the respondent.

WINSLOW, J. The railroad yard in which the accident occurred was within the limits of the city of Stevens Point, and was crossed by several streets. One of the elements of negligence which the jury found, and upon which the plaintiff below based her right to recover, was, that the switch-engine which ran over the intestate was being driven at a negligently high rate of speed, or considerably more than six miles an hour, contrary to the terms of section 1809 of the Revised Statutes. Upon the trial, the defense offered to prove that it was the universal custom in the yard, before and at the time of the accident, to run switch engines in doing the yard-work much faster than six miles an hour, and that the deceased well knew it. This proof was objected to, and the objection sustained, and this ruling presents the first question to be passed upon. It is said, in support of the ruling, that such a custom would be unlawful, and that proof of a constant violation of law cannot be available as a defense. This is undoubtedly true, and were this the question presented here, we should probably have no difficulty in affirming the ruling below. But it was not the bare fact that engines habitually ran faster than six miles per hour which the defense offered to show; they offered to prove that the deceased well knew this fact. Now, while the custom of running switch-engines at an illegal or dangerous rate of speed is no defense, it is quite apparent that if the deceased knew that the engines in the yard constantly were operated at such a rate of speed, and chose, without objection, to remain in his employment, it was entirely competent to prove the two facts, as bearing on the extent of the risk which the deceased voluntarily assumed. The defendants could not be relieved of responsibility by the single fact that they were in the habit of running their engines with reckless and unlawful speed, but the degree of care required of the intestate would be legitimately affected by the fact that deceased knew of the speed constantly used,

and chose to remain in his employment, and subject to the danger, without objection. It is not proof of an illegal custom as a defense, but proof that an employee knew of the habitual use of his employer's machinery in a particular and dangerous way, and remained in the service without objection. The custom does not affect the right of action, but the knowing acquiescence therein may do so. The evidence offered should have been received.

The court charged the jury, on the subject of damages, that the damages "must be the money value only to her and her children which the life of the deceased was worth to her and them on the day of his death." The same idea is repeated in other parts of the charge. This was error. The fact that there are children left surviving, whose support will be thrown on the plaintiff, is proper to be shown in evidence, and to be considered by the jury; but the damages recoverable are those which the widow has suffered, not those which the children have suffered.

It follows from these views that there must be a new trial.

By the COURT. Judgment of the circuit court reversed, and cause remanded for a new trial.

RAILROAD COMPANIES—INJURY TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE.—Disobedience to rules will disable an employee from recovering damages for an injury of which that disobedience was wholly or partially the cause: *Darracott v. Chesapeake etc. R. R. Co.*, 83 Va. 288; 5 Am. St. Rep. 266; *La Croy v. New York etc. R'y Co.*, 132 N. Y. 570. But if it appears that the company knew of the habitual violation of the rule, disobedience to which caused the injury, and acquiesced in that violation in such a way as practically to abrogate the rule itself, the employee can recover: *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610; *Sloan v. Georgia Pac. R'y Co.*, 86 Ga. 15; *Schaub v. Hannibal etc. R'y Co.*, 106 Mo. 74.

INJURIES TO EMPLOYEES—EFFECT OF EMPLOYEE'S KNOWLEDGE OF DANGER.—When a servant accepts an employment with full knowledge of its risks, and continues therein after having had his attention specially called to the alleged source of the accident by which he is afterwards injured, no recovery can be had against the master for such injury: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944; *Georgia Pacific R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Atchison etc. R'y Co. v. Schroeder*, 47 Kan. 316. But if the employer is aware of the existence of the danger, he will not be absolved from liability, though the employee, after becoming acquainted with the negligent way in which his employer's business was conducted, continued to work for him: *Richmond etc. R'y Co. v. Normont*, 84 Va. 167; 10 Am. St. Rep. 827. See note to last-mentioned case, p. 835, for additional authorities; also notes to *Porter v. Western N. O. R. R. Co.*, 2 Am. St. Rep. 278, 279; *Gulf etc. R'y Co. v. Donnelly*, 8 Am. St. Rep. 610.

DAMAGES FOR DEATH CAUSED BY NEGLIGENCE—EVIDENCE ADMISSIBLE.—Widow suing to recover for death of husband may testify as to the number and ages of her minor children: *Tetherow v. St. Joseph etc. Ry Co.*, 98 Mo. 74; 14 Am. St. Rep. 617; *Seeder v. St. Louis etc. Ry Co.*, 100 Mo. 673; 18 Am. St. Rep. 724.

WELCH v. MITCHELL.

[31 WISCONSIN, 564.]

PLEADING—FRAUD UPON CREDITORS.—If a sheriff, sued for converting chattels, justifies as such sheriff under a judgment and execution against H., and avers that the property alleged to have been converted was the property of H., and liable to seizure and sale under the execution against him, these averments are sufficient to allow the defendant to introduce evidence tending to prove that the transfer from H., under which the plaintiff claimed title, was fraudulent and void as against H.'s creditors.

EVIDENCE—DECLARATIONS OF A VENDOR MADE AFTER HE HAS TRANSFERRED PROPERTY are not admissible, as against his transferee, to impeach the transfer.

PRACTICE—EXCEPTIONS TO JUDGE'S CHARGE.—A bill of exceptions which shows that certain requests were made for instructions to a jury, and that "each and every of such instructions asked for the judge refused to give, except as given in the general charge, and the defendants, by their counsel, then and there duly excepted," and the general charge extends over thirteen pages, the exception is not sufficiently specific and certain.

CHATTEL MORTGAGE.—A PRIVATE SALE OF CHATTELS BY A MORTGAGEE, WITHOUT GIVING PREVIOUS NOTICE thereof, as required by statute, is not void. The statute was enacted for the protection of the mortgagor, and he may waive its benefit, and elect not to claim it.

ACTION against the defendants, Mitchell and Gault, who were respectively sheriff and deputy sheriff, for the wrongful conversion of personal property. The defendants in their answer alleged an execution issued on a judgment in favor of one Merriman against one Hogle, and that under such execution the defendants, acting as sheriff and deputy sheriff, seized the property described in the complaint, and that it was at the time the property of Hogle, and liable to seizure and sale under execution against him. The plaintiff's title was based upon numerous chattel mortgages made by Hogle to certain of his creditors, and also upon a sale as to some of the property made by Hogle directly to the plaintiff. Defendants insisted that the mortgages and bill of sale which were necessary to make out plaintiff's title were void, because they were made with a view to hinder, delay, and defraud the creditors of Hogle, of whom the judgment creditor, Merriman, had been one

ever since 1887. The court, however, at first excluded evidence offered for the purpose of showing the fraudulent character of such transfers, but afterwards, during the trial, rescinded its ruling, and admitted all the evidence offered for that purpose. The debtor, Hogle, being called as a witness on behalf of the defendants, testified adversely to them, and they thereupon called another witness, by whom they sought to prove declarations made by Hogle after the execution of the bill of sale and mortgages, in conflict with his present statements, and tending to show that such bill and mortgages were fraudulent, but such testimony was excluded. Evidence was also received to show that no immediate delivery or continued change of possession had occurred with respect to the property embraced in the bill of sale, and also tending in other respects to impeach plaintiff's title as being fraudulent as against Hogle's creditors, which latter testimony conflicted with other evidence offered on the part of the plaintiff to sustain the mortgages and bill of sale. The defendants submitted four requests to charge the jury, two of which the appellate court regarded as substantially correct. The court having refused to give any of such charges as requested, the bill of exceptions stated that "each and every of such instructions asked for by the defendants the court refused to give, except as given in the general charge, and the defendants, by their counsel, to such refusal then and there duly excepted." The jury returned a verdict for the plaintiff, which the defendants moved to set aside; the motion was denied, and judgment entered on the verdict, from which the defendants appealed.

S. A. Corning and R. W. Hubbell, for the appellants.

Cate, Jones, and Sanborn, for the respondent.

PINNEY, J. 1. The answer of the defendants was sufficient, within the decisions of this court from the earliest period, to allow them to give evidence to show that the title of the plaintiff was fraudulent and void as against Hogle's creditors, and as against the defendants seizing it under valid process for the satisfaction of his debt to Merriman, although the answer did not contain any express allegations of its fraudulent character. It was enough for the defendants, as officers, to plead their process, and to allege, as they did, that the property seized by them was, at the time, the property of the debtor in the execution, and liable to seizure and sale under it: *Martin*

v. *Watson*, 8 Wis. 315; *Blakeslee v. Rossman*, 44 Wis. 553-555. Some evidence was offered for the purpose of showing fraud in the plaintiff's title as against Hogle's creditors, and excluded; but the circuit judge reconsidered the ruling, and decided that such evidence was admissible under the answer, and thereafter received all proper evidence tendered by the defendants on that point. It does not appear that the defendants were prejudiced by the ruling complained of, and under the circumstances, we think they cannot maintain their assignment of error in this respect. It is proper to observe, in this connection, that the defendants sought, by their cross-examination of the plaintiff when he was a witness in his own behalf to make out his case, to elicit some evidence to the same effect; but the inquiry was not pertinent to any matter testified to by him on his direct examination, and was not, therefore, properly cross-examination; and besides, the defendants had not then entered upon their defense, and it did not then appear that they represented the rights of Merriman as a creditor of Hogle. The ruling of the circuit court sustaining objections to the inquiry as then proposed was manifestly correct.

2. The evidence offered to show that Hogle, the judgment debtor under the execution, after the execution of the mortgages and bill of sale, made statements at variance with his testimony as a witness for the defendants, and which also tended to show that the plaintiff's title was fraudulent, was so clearly inadmissible as not to require comment. The defendants could not thus impeach their own witness, nor could they give in evidence Hogle's subsequent declarations to impeach the mortgages and bill of sale theretofore executed: *Greenl. Ev.*, sec. 444 a; *Norton v. Kearney*, 10 Wis. 443; *Bates v. Ableman*, 13 Wis. 644; *Grant v. Lewis*, 14 Wis. 487; 80 Am. Dec. 785.

8. The court submitted the question to the jury as to the *bona fides* of the bill of sale in terms quite as favorable to the defendants as they had a right to ask, and the general charge of the court was quite elaborate, and all exceptions taken to it, in view of the evidence, are untenable. The exception to the refusal of the court to give the four instructions asked by defendants is to the refusal to give them, except as given in the general charge, which extends over thirteen printed pages, the requested instructions covering three additional pages. This exception is not sufficiently specific and certain. To ascer-

tain whether there is any ground for it requires a careful and critical comparison in all particulars of the requested instructions with the entire charge. The exception is clearly unavailing. The office of an exception is to point out the ruling or decision excepted to with clearness and common certainty.

4. The objection to the plaintiff's title to a part of the property in question, that it was derived by a private sale from the mortgagee under one of the chattel mortgages, without previous notice given thereof, contrary to the provisions of chapter 294, Laws of 1887, and is therefore void, is not well taken. This statute was designed for the protection of the mortgagor, and he may waive the benefit of the statute or elect not to claim it: *Stevens v. Breen*, 75 Wis. 600.

Upon the questions of fact involved, there being a conflict of evidence and sufficient evidence to support the verdict, it cannot now be disturbed. We do not perceive any error in the case of which the defendants can complain.

By the COURT. The judgment of the circuit court is affirmed.

EVIDENCE — DECLARATIONS OF GRANTOR AFTER TRANSFER, WHETHER ADMISSIBLE TO INVALIDATE TRANSFER. — The acts and declarations of a grantor subsequent to his deed cannot be received in evidence to invalidate it: *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455, and note; *Galland v. Jackman*, 26 Cal. 79; 85 Am. Dec. 172, and note; extended note to *Horton v. Smith*, 42 Am. Dec. 632; *Beville v. Jones*, 74 Tex. 148. The declarations of a vendor, made at the time of the purchase, that a street abutted on one of the lines of the land sold, are admissible against his heirs, who claim title to show a dedication to public use by the ancestor: *Burnett v. Harrington*, 70 Tex. 213.

BILLS OF EXCEPTIONS — SUFFICIENCY OF. — A bill of exceptions should be so full in its statements that the errors complained of appear from the allegations of the bill itself: *Quintana v. State*, 29 Tex. App. 401; 25 Am. St. Rep. 730.

CHattel MORTGAGES. — SALES BY MORTGAGEE: See note to *Wygal v. Bigelow*, 16 Am. St. Rep. 499. Where a mortgagee of goods which were subject to the claims of other creditors sold the goods at private sale, he was held to account to such creditors for the value of the goods: *Linsinger v. Heron*, 23 Neb. 197.

ENGLAND v. WESTCHESTER FIRE INSURANCE CO.

[81 WISCONSIN, 582.]

INSURANCE — VACANT AND UNOCCUPIED PREMISES. — If a policy of insurance declares that it shall be void if the building, if intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days, and the building is vacant when it is issued, it is valid, and so continues for the period of ten days, after which, if the building remains vacant and unoccupied, the policy ceases to be in force, and no recovery can be had thereon for the destruction of the property by fire after the period of ten days has elapsed, and while it remains vacant and unoccupied, the insurer never having consented to its continuing vacancy.

INSURANCE — WAIVER OF CONDITION AGAINST A BUILDING CONTINUING VACANT for ten days will not be presumed from the mere fact that it was vacant when the insurance was effected, when nothing whatever occurred or took place between the parties upon this subject at the time, or thereafter, before the loss.

INSURANCE — THE FACT THAT A PREVIOUS POLICY ON THE SAME PROPERTY DID NOT CONTAIN ANY CONDITION against the property being vacant and unoccupied does not prevent such condition from being operative, when there is no pretense of fraud or mistake, and the assured had ample opportunity to examine his policy and learn its contents.

L. A. Doolittle and R. W. Barger, for the appellant.

Baker and Helms, for the respondents.

PINNEY, J. The liability of the defendant depends upon the proper construction of the condition contained in the policy issued by it, that it should be void if the barn described in it, "whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days," unless otherwise provided by an agreement indorsed on or added to the policy. The premises were vacant and unoccupied at the date of the policy, and so remained, without the knowledge or consent of the company, until the loss in question occurred.

The clause "whether intended for occupancy by owner or tenant" was plainly intended to give the same effect to non-occupancy or failure to use the building arising from the act or omission of a tenant, upon a policy issued to the owner, as if it occurred by reason of the act or omission of the owner himself. The substance of the warranty contained in the policy, which was continuing in its nature, was aimed, not against mere vacancy or non-occupancy existing at any particular period, — whether at the date of the policy or at any subsequent time, — as affecting the risk, but against the ex-

istence of such a condition of the building, continuing for ten days at any time after the policy was issued. If the building was vacant and unoccupied at the date of the policy, the insured, within ten days, might use and occupy it so as to save the policy. No good reason can be suggested why vacancy or non-occupancy should be attended with any greater effect if it existed at the date of the policy than if occurring at any subsequent period, when, to be effective as a breach of warranty and consequent forfeiture, it was necessary it should continue for ten days. We think that by a fair grammatical construction of the language the clause "and so remain for ten days" applies as well to the present as to the future condition of the property. Any other construction seems foreign to the intention of the parties as manifested by the language used, and would result in making the policy void *ab initio*, — a construction to be avoided if the language is reasonably susceptible of any other meaning. The language of the policy should not only be construed most strictly against the insurer who has issued it, and in favor of the insured, but so as to render the contract valid and operative: *Kircher v. Milwaukee M. M. Ins. Co.*, 74 Wis. 473, and cases there cited; *Darrow v. Family Fund Soc.*, 116 N. Y. 544; *Coyne v. Weaver*, 84 N. Y. 386. If the construction we have given to the policy is correct, then the clause in question was violated by the building insured under it remaining vacant and unoccupied for ten days, and the consequence is, that the policy became void, and no recovery can be had on it.

On behalf of the respondents it is claimed that as the premises were vacant and unoccupied at the date of the policy, it is to be presumed that the insurer knew of the fact, or is chargeable with knowledge of it, and is deemed to have waived the requirement in question. Neither the argument nor the cases cited meet the necessity of the case; for it may well be said that actual knowledge, at the time of issuing the policy, of existing facts that by the terms of the policy would prevent it from attaching, and render it void from its inception, will amount to a waiver of stipulations in the policy in relation thereto; but it cannot, we think, be successfully maintained that, conceding that knowledge of vacancy or non-occupancy is to be imputed, as a matter of law, to the insurer, there is any implied consent to the continuance of such condition of the premises, or that the insurer is thereby affected with notice that they so continued and remained

thereafter vacant and unoccupied, contrary to the express continuing warranty or condition on that subject contained in the policy. Under the policy in question, it was clearly the duty of the insured to make good their warranty in this respect, and they knew perfectly well that they had failed to do so. Nothing took place between the parties on the subject. There is no reason for imputing to the insurer, as a matter of law, knowledge of the breach of the stipulation in regard to the occupancy or use of the premises, for there is nothing inconsistent in the fact of existing vacancy or non-occupancy with the express stipulation of an executory character that it shall not so continue for ten days; for such mere implied knowledge at the date of the policy cannot be construed into a consent that it shall continue for a longer period, contrary to the express stipulation of the parties. There is therefore no ground for saying that the insurer, after having taken the stipulation in question, took the chances as to whether the insured complied with it. Failure to comply with the policy in this respect terminated all liability under it. The construction we have thus placed upon the policy is the most beneficial one for the insured. Under it the policy attached at once to the risk, when otherwise it would be void in its inception, and the insured had ten days within which to make good the condition of the policy in respect to use or occupancy.

The respondents' counsel place reliance upon the case of *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138, upon which mainly it is understood the case was decided in the circuit court. In this case, the provision was, that in case the premises "become vacant and unoccupied, and so remain, with knowledge of the assured, without notice to and consent of the company in writing," the policy should be void. The premises were vacant and unoccupied at the time of the insurance, and so continued until the building was destroyed by fire, and it was held that there was a breach of the condition; and that when the insurer fails to inquire as to occupation, unless there is proof of concealment, it is not evidence of bad faith which will vitiate the policy; and that where no statement is made in the policy as to the occupation, it must be assumed that the insurance was made without regard to occupation; and the court held that it was a question of fact for the jury to determine whether the agent of the insurer knew the condition of the premises, and regarded the matter of occupation

as immaterial. If he did so, then the condition might be regarded as waived. This case does not sustain the position that notice and waiver are to be implied from the fact that the premises, at the date of the policy, were vacant or unoccupied. This is made quite clear by the subsequent cases of *Sanders v. Cooper*, 115 N. Y. 287; 12 Am. St. Rep. 801, and *Walton v. Agricultural Ins. Co.*, 116 N. Y. 322, in which the case of *Short v. Home Ins. Co.*, 90 N. Y. 16, 48 Am. Rep. 138, and other like cases, are cited and considered.

The cases of *Commonwealth v. Hide and Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72, and *Washington Mills E. M. Co. v. Weymouth & B. M. F. Ins. Co.*, 135 Mass. 505, do not go beyond holding that where no inquiry is made as to title and the like, and no representation is made in that regard by the insured, the policy will not be avoided without showing misrepresentation or concealment; that an innocent failure to communicate material facts will not avoid it, although the policy contains the provision that "the assured covenants that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to them; and that if any material fact or circumstance shall not have been fairly represented," the policy shall be void. In the case first named (112 Mass. 136; 17 Am. Rep. 72), the insurers chose to issue the policy on their own examination, without the application contemplated by the provision quoted. In the case of *Philadelphia Tool Co. v. British Am. Assur. Co.*, 132 Pa. St. 241, much relied on by respondents, the policy, in like manner, was issued without written request describing the interest of the insured in the building, and no actual representation was made by him on that subject; and it was held that as the policy could be avoided only on the ground of fraud, and as fraud could not be presumed, the court ought to assume, for the purposes of that issue, that the policy was written upon the knowledge of the insurer, for which the insured was not responsible.

These cases fall far short of showing that there was or could be an implied waiver of the continuing condition or warranty as to future use or occupation in this case, founded upon a mere presumption that the insurer knew that the premises were vacant and unoccupied at the date of the policy, when nothing whatever occurred or took place between the parties

on this subject at the time, or thereafter, before the loss. The insurer took a stipulation, as to the future merely, against vacancy or non-occupancy, as affecting the risk, continuing for more than ten days. There is no pretense that until after the loss occurred the defendant had any notice whatever that the condition in question had not been kept, or that it had in any way or manner waived such breach. Waiver implies actual knowledge of some essential objection or condition going to the liability of the insurer: *McFarland v. St. Paul etc. Ins. Co.*, 46 Minn. 519; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212; 25 Am. St. Rep. 676; *Bonneville v. Western Assur. Co.*, 68 Wis. 298; *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297. The proof of waiver of a material provision of the policy ought to be reasonably clear and certain: *Bosworth v. Merchants' F. Ins. Co.*, 80 Wis. 893, and cases cited; *Stevens v. Queen Ins. Co.*, 81 Wis. 335; *ante*, p. 905.

It is not material that a former policy, issued by the defendant company to the plaintiff on the same property, did not contain the same provision in regard to the use or occupancy of the premises as the one in suit. There is no pretense of fraud or mistake, and the plaintiffs having had ample opportunity to examine the policy in suit and learn its terms, it must be presumed that they assented to the policy as written. Indeed, by bringing their action on the policy, the plaintiffs confirmed it, and are bound by all its provisions: *Bonneville v. Western Assur. Co.*, 68 Wis. 298; *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 43.

We hold, therefore, that by the true construction of the policy it was not void, because the premises mentioned in it at the time it was issued were vacant or unoccupied; that the policy in question attached to the risk, and was avoided by the premises remaining thereafter vacant and unoccupied for ten days, in violation of the continuing condition or warranty contained in the policy; and that there is no evidence whatever to show any waiver of the condition or forfeiture. The circuit court erred in not directing a verdict for the defendant, and in directing the jury to find for the plaintiff.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

INSURANCE — CONDITION AGAINST PREMISES BECOMING VACANT AND UNOCCUPIED. — Where an applicant for insurance on a building makes an express oral agreement that it shall be occupied, and a policy is thereupon

delivered to him, such policy will not be avoided by his subsequent failure to fulfill such promise, unless fraud is proved: *Kimball v. Aetna Ins. Co.*, 9 Allen, 540; 85 Am. Dec. 786, and note. An answer by an applicant for insurance, that the building will be occupied by a tenant, even if regarded as a warranty, nevertheless the defense that the building was unoccupied at the time of the fire will fail, unless it appear that the risk was increased by want of a tenant: *Herrick v. Union Mut. etc. Ins. Co.*, 48 Me. 558; 77 Am. Dec. 244. A warranty in an insurance contract that the house should be occupied by a tenant, it then being vacant, would not be broken, when the policy states no time in which it is to be occupied, if it is occupied within a reasonable time: *Hough v. City etc. Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581, and note.

INSURANCE — WARRANTY OF OCCUPATION — WAIVER OF. — If a building was insured simply as "occupied" by a policy conditioned to be void if any change be made as to tenants or occupancy, the policy will not be avoided by the premises becoming unoccupied: *Somerset County etc. Ins. Co. v. Usam*, 112 Pa. St. 80; 56 Am. Rep. 307. If an insurance company insures vacant premises, knowing that they are vacant, but provides in the policy that the insurance shall be void if the premises become vacant, it must be presumed that this provision was waived: *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138; see *Boyd v. Insurance Co.*, 90 Tenn. 212; 25 Am. St. Rep. 676, and note.

GILBERT v. STOCKMAN.

[21 WISCONSIN, 602.]

CREDITOR'S BILL TO REACH PROPERTY WHICH THE JUDGMENT DEBTOR HAS CONVEYED WITHOUT CONSIDERATION, for the purpose of defrauding his creditors, cannot be sustained, when such conveyance antedates the judgment on which the plaintiff relies, and no execution had ever issued thereon.

CREDITOR'S BILL. — Whenever the nature of the property or thing in action is such or the same is held in trust for the insolvent judgment debtor so that it cannot be reached at law by levy and sale on execution, then the execution must be returned unsatisfied in whole or in part before a creditor's bill can be maintained to reach the same.

EXECUTION. — **PROPERTY BOUGHT AND PAID FOR BY A DEBTOR**, the title to which he takes in the name of another, with intent to hinder, delay, and defraud creditors, cannot be reached and sold under execution against such debtor.

CREDITOR'S BILL, WHEN A JUDGMENT CREDITOR HAS NOT A VALID LIEN ON THE PROPERTY, cannot be sustained, unless an execution has been issued and returned wholly or partly unsatisfied.

JUDGMENT IS NOT A LIEN UPON LANDS WHICH THE JUDGMENT DEBTOR BEFORE ITS ENTRY HAD CONVEYED without consideration and for the purpose of defrauding his creditors, under a statute declaring that a judgment is a lien upon all lands not exempt from execution which the debtor may have at the time of the docketing thereof, or which he shall have acquired at any time thereafter within the period of ten years.

FRAUDULENT CONVEYANCES. — **CONVEYANCE INTENDED TO DELAY AND DEFRAUD CREDITORS**, and made without consideration, is valid between the parties and their personal representatives.

BILL in equity to cancel a conveyance executed by defendants Stockman and wife, July 3, 1890, to the defendant Fletcher. The complaint alleged that such conveyance was made without consideration, for the purpose of delaying, hindering, cheating, and defrauding Stockman's creditors, including the plaintiff; that plaintiff, on November 11, 1890, recovered a judgment against Stockman in the circuit court, which was docketed on that day, and remains unsatisfied, and that on November 28, 1890, plaintiff caused another judgment to be docketed in the circuit court, and that the debts for which both of such judgments were recovered accrued prior to July, 1890. A demurrer to the bill was sustained, and from the order sustaining it the plaintiff appealed.

Henry Anderson, Spooner and Taylor, and Richmond and Smith, for the appellant.

R. D. Whitford, for the respondents.

CASSODAY, J. The deed from the judgment debtor to his father-in-law was executed and recorded more than four months prior to the time when either of the plaintiff's judgments was docketed in St. Croix County, in which the land in question is situated. There is no claim that any execution was ever levied upon the land, or even issued upon either of those judgments. Equitable aid is invoked on the ground that the deed was given without consideration by an insolvent debtor, with the intent to hinder, delay, or defraud his creditors, including the plaintiff. The question is, whether it can be granted upon such a showing.

There is certainly a great diversity of opinion in the several states as to the question suggested, depending, it is believed, very much upon local statutes. It seems to be conceded, as a general rule, that whenever the nature of the property or thing in action is such or the same is held in trust for the insolvent judgment debtor so that it cannot be reached at law by levy and sale on execution, then the execution must be returned unsatisfied in whole or in part before a bill in equity, or what is usually known as a "creditor's bill," can be maintained to reach the same. In such case, the equitable lien is created, not by the judgment and execution, but by the filing of the bill and the service of process: *Dunlevy v. Tallmadge*, 82 N. Y. 457. This rule, requiring the return of an execution unsatisfied, is embodied in our statute: Rev. Stats., sec. 8029.

Formerly, it was held in New York that where an insolvent debtor bought and paid for land with his own money, and took the title in the name of his wife or another, with the intent to hinder, delay, or defraud his creditors, such land could nevertheless be reached and sold on execution against the debtor: *Wait v. Day*, 4 Denio, 439. But that case was expressly overruled in *Garfield v. Hatmaker*, 15 N. Y. 475, in an able opinion by Comstock, J., on the ground that the then recently revised statutes of that state had abolished the uses and trusts in favor of the debtor so paying the consideration which was implied at common law, and hence left in such debtor no legal or equitable estate to which such execution at law could attach. This ruling has become firmly established by repeated adjudications in New York: *Wood v. Robinson*, 22 N. Y. 564; *McCartney v. Bostwick*, 32 N. Y. 53; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 17; *Everett v. Everett*, 48 N. Y. 223; *Estes v. Wilcox*, 67 N. Y. 264; *Underwood v. Sutcliffe*, 77 N. Y. 58. We have the same statutes in these respects, and have followed the same construction: Rev. Stats., sec. 2077; *Hyde v. Chapman*, 33 Wis. 391; *Kluender v. Fenske*, 53 Wis. 122; *Pavey v. American Ins. Co.*, 56 Wis. 224; *Week v. Bosworth*, 61 Wis. 85; *Cerney v. Pawlot*, 66 Wis. 262; *Skinner v. James*, 69 Wis. 611; *Campbell v. Campbell*, 70 Wis. 311; *Watters v. McGuigan*, 72 Wis. 155; *Gottelmann v. Gitz*, 78 Wis. 439. To the same effect are *Griffin v. Nitcher*, 57 Me. 270; *Hartshorn v. Eames*, 31 Me. 93.

The difference between an insolvent debtor thus purchasing land in the name of another with the intent to hinder, delay, or defraud his creditors, or the making of a conveyance from himself directly to such third person with the same intent, is, to say the most, very slight, since the purpose and effect in each case is substantially the same; and yet it is firmly established by the authorities cited that if such insolvent debtor purchases land in the name of another with the intent to hinder, delay, or defraud his creditors, such land cannot be reached by execution nor in equity until the execution has been issued and returned unsatisfied in whole or in part.

Such return can only be dispensed with where the judgment creditor has first obtained a valid lien at law upon the land. What are the essentials of such a lien? Originally, at common law, a judgment was not, strictly speaking, a lien upon real estate. Thus Lord Chancellor Cottenham said: "It is not correct to say that, according to the usual accepta-

tion of the term, the creditor obtains a lien by virtue of his judgment. . . . What gives a judgment creditor a right against the estate is only the act of Parliament; for, independently of that, he has none. The act of Parliament gives him, if he pleases, an option by the writ of *elegit*, — the very name implying that it is an option, — which if he exercises, he is entitled to have a writ directed to the sheriff to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is to give to the creditor a legal title which, if no impediment prevent him, he may enforce at law by ejectment." Then, after indicating that equity would aid in the removal of such impediment, he said: "Suppose he [the judgment creditor] never sues out the writ, and never, therefore, exercises his option. Is this court to give him the benefit of a lien to which he has never chosen to assert his right? The reasoning would seem very strong that as this court is lending its aid to the legal right, the party must have previously armed himself with that which constitutes his legal right, and that which constitutes the legal right is the writ." The act of Parliament thus referred to was 13 Edw. I., c. 18, which declared, in effect, that upon the recovery of a judgment, "it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of *fiery facias* unto the sheriff for to levy the debt of the lands and goods," etc. At common law, such writ was to be sued out within a year and a day after the judgment was entered; otherwise it would be deemed satisfied, unless revived: 3 Bla. Com. 421. Such English rule became operative as a part of the common law of this country, except in so far as modified by local statutes: *Burton v. Smith*, 13 Pet. 479; *Spaulding v. Chicago etc. R'y Co.*, 30 Wis. 110; 11 Am. Rep. 550. "It is not understood," said Mr. Justice Story, "that a general lien by judgment on land constitutes *per se* a property or right in land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate encumbrances": *Conard v. Atlantic Ins. Co.*, 1 Pet. 448. Our statute makes a judgment, when docketed as required, a lien, for the period of ten years, on the real property not exempt which the debtor "may have at the time of docketing thereof in the county in which such real estate is situated, or which he shall acquire

at any time thereafter within said period of ten years": Rev. Stats., sec. 2902.

The contention is, that every conveyance made with the intent to hinder, delay, or defraud creditors is made void, as against the person so hindered, delayed, or defrauded, by section 2320 of the Revised Statutes, and hence that the deed in question, although made and recorded long prior to the docketing of either of the plaintiff's judgments, was nevertheless utterly void, and of no effect as against creditors, including the plaintiff. But such claim is obviously subject to several qualifications. No one would seriously contend, under the statutes of this state, that the validity of such deed could be questioned by a mere creditor at large, or by a mere foreign judgment creditor, or by a judgment creditor whose judgment is docketed merely in some other county than the one in which the land is situated, and upon which no execution has been issued, nor even a judgment recovered in the county where the land is situated, unless the same should first be also docketed in that county. In other words, if the plaintiff's judgments are liens upon the land in question, it is by virtue of the mere clerical act of docketing the judgments in St. Croix County as required by statute: Rev. Stats., secs. 2899-2901. The mere clerical act of docketing one judgment is the same as docketing any other judgment, and yet the one may be based upon a debt contracted prior to such fraudulent conveyance, and the other upon a debt contracted after such conveyance; and hence the one might, by a creditor's bill, or bill in aid of an execution, be successfully enforced against such conveyance, while the other could not,—depending upon facts outside of such docket.

Again, the deed in question was valid between the parties and their personal representatives: *Clemens v. Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Dietrich v. Koch*, 35 Wis. 618; *Mehlhop v. Pettibone*, 54 Wis. 657; *Davy v. Kelley*, 66 Wis. 452. By that deed, the judgment debtor absolutely parted with any and all right, title, and interest in the land, beyond any reclaiming, whether in equity or at law, long before such docketing. And yet we are asked to say that such docketing of the judgments made them liens upon the land at law, notwithstanding the statute only makes a judgment a lien upon the land owned by the judgment debtor at the time of docketing the same or thereafter, and not upon lands in which he then had no interest whatever. Besides, if such docketing

made the judgments liens at law, then such lien would be absolute, and the fraudulent grantee could not thereafter convey the same, even to a *bona fide* purchaser for full value.

The several sections of our statutes referred to are each taken substantially, if not literally, from the corresponding sections of the New York statutes. Under such statutes, the New York courts have frequently held that to enable a judgment creditor to obtain the aid of a court of equity, it is essential either that an execution be first issued and returned unsatisfied in whole or in part, or that the action be brought in aid of an execution then outstanding: *Adsit v. Butler*, 87 N. Y. 585; *McCullough v. Colby*, 5 Bosw. 477; *Geery v. Geery*, 63 N. Y. 252; *Fox v. Moyer*, 54 N. Y. 125-129; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Shaw v. Dwight*, 27 N. Y. 244; 84 Am. Dec. 275; *North Am. F. Ins. Co. v. Graham*, 5 Sand. 197; *Lichtenberg v. Herdtfelter*, 33 Hun, 57; *Hadden v. Spader*, 20 Johns. 554. In *Adsit v. Butler*, 87 N. Y. 585, the facts were substantially the same as in the case at bar. The complaint alleged, in effect, the recovery of two judgments against Rosekrans in 1875; that he had previously conveyed the premises described to one Blackmore, who, by the procurement of Rosekrans, conveyed the same to the defendant's testator, the original defendant; that Rosekrans was insolvent; that such conveyances were without consideration, made, and in pursuance of a scheme to which said testator was a party, to hinder, delay, and defraud the creditors of Rosekrans, who died in 1877. The defendant demurred, on the ground that the complaint did not state a cause of action. The court sustained the demurrer, and judgment was entered thereon accordingly. In the court of appeals, it was held that "in an action by a judgment creditor to set aside, on the ground of fraud, a conveyance of real estate by the debtor, the complaint must allege the issuing of an execution upon the judgment. The return of an execution unsatisfied is essential to give the court jurisdiction, or the action must be brought in aid of an execution then outstanding." This is on the theory that before a court of equity will lend its aid in such a case, the judgment creditor must have "exhausted all the remedies known to the law to obtain satisfaction on the judgment." In that state, an execution becomes a general lien on the debtor's personal property as soon as placed in the hands of the sheriff. Nevertheless, it must either be returned unsatisfied, or levied upon

specific personal property, before the aid of equity can be successfully invoked.

There are adjudications in other states to the same effect as in New York. Thus in Maine, it has been held that where a bill in equity alleges that the plaintiff's judgment debtor had conveyed his real and personal estate to others, in fraud of his creditors, and seeks relief for that cause, if the bill does not also allege that the plaintiff has made a levy upon the land, or an attempt to seize and sell the goods, or that an officer has returned the execution without being able to obtain satisfaction, or such facts as to show the plaintiff has exhausted his remedy at law, the bill will be dismissed, on demurrer thereto, for want of jurisdiction: *Webster v. Clark*, 25 Me. 313; *Dana v. Haskell*, 41 Me. 25. So in Vermont, it has been held that "a court of chancery will not ordinarily interpose to aid a creditor in reaching the real estate of his debtor, unless he has perfected his claim so far as he can at law, by obtaining judgment and levying upon the estate": *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54. So in a case from Nebraska, it was held in *Jones v. Green*, 1 Wall. 330, that "a bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor, held by a third party upon a secret trust for him, to the satisfaction of the judgment, until an attempt has been made for their collection at law, by the issue of execution thereon." The opinion in that case is by Mr. Justice Field, and is based upon earlier New York cases.

There are undoubtedly decisions in some states which sustain the contention of the learned counsel for the plaintiff. In fact, some of them go to the extent of sustaining a creditor's bill by a mere creditor at large. But the decisions in this state, so far as they have gone, are believed to be in harmony with the rules thus maintained in New York, from which state we borrowed our statutes on the subject. In some of these cases the execution had been issued and returned unsatisfied, and thereupon a regular creditor's bill was filed to set aside a prior conveyance; and hence the question here presented did not arise: *Gates v. Boomer*, 17 Wis. 455; *Winslow v. Doussman*, 18 Wis. 456; *Meissner v. Meissner*, 68 Wis. 343; *Williams v. Sexton*, 19 Wis. 42; *Daskam v. Neff*, 79 Wis. 161. In *Eastman v. Schettler*, 13 Wis. 324, the debtor conveyed the land with the intent to hinder, delay, and defraud his creditors, pending a suit against him. Upon the recovery

and docketing of the judgment in the action thus pending against him, an execution was issued thereon, and the land so conveyed levied upon and sold to the plaintiff, who, upon receiving the sheriff's deed upon such sale, brought an action at law to recover the land. On the trial, the court excluded all evidence of title in the judgment debtor, and the judgment roll in the action against him; and such ruling was held to be error. It must be conceded that had the judgment creditor, prior to such sale, brought an action in equity in aid of such execution and levy, the court would, upon the principles of that decision, necessarily have held such action maintainable. But that case goes to the extreme limit of any adjudication in this court, as will be observed by a careful examination of the cases cited: *Cornell v. Radway*, 22 Wis. 260; *Smith v. Weeks*, 60 Wis. 104; *Mason v. Pierron*, 63 Wis. 246; *Galloway v. Hamilton*, 68 Wis. 651; *Evans v. Laughton*, 69 Wis. 138; *Ahlhauser v. Doud*, 74 Wis. 400; *Woodward v. Hall*, 75 Wis. 406. In *Cornell v. Radway*, 22 Wis. 260, the judgment debtor had title and possession of the land before and at the time of the docketing of the judgment against him, and never parted with the same; and besides, an execution had been issued thereon and levied upon the land, and the suit was in aid of such execution and levy. *Galloway v. Hamilton*, 68 Wis. 651, was to the same effect. In the case at bar, no execution was ever issued, much less levied upon the land in question, or returned unsatisfied. Such being the fact, the demurrer was properly sustained.

By the COURT. The order of the circuit court is affirmed.

From the foregoing opinion Justices Winslow and Pinney dissented, the latter expressing his dissent in a lengthy opinion. He contended that the facts disclosed by the complainant's bill established a clear case of actual, positive fraud upon which the plaintiff was entitled to relief in equity; that the only purpose of having an execution issued and returned unsatisfied would be to establish that the complainant had no remedy at law; and that his absence of remedy being manifest from the admitted allegations of the bill, it was not necessary for the complainant to resort to the vain proceeding of having an execution issued and returned "no property found." He further insisted that if the conveyance assailed was fraudulent, it was absolutely void as against the complainant, and therefore that the judgments were a lien in favor of the complainant to the same extent as if the fraudulent conveyance had not been executed. He further said: "A judgment creditor has the choice of three remedies as against the prior fraudulent conveyance. He may sell the land upon execution issued on his judgment, and the purchaser may contest the validity of the title of the fraudulent grantee in an action

of ejectment; or he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of such action before selling the property; or he may proceed by action in the nature of a creditor's suit to have the conveyance adjudged fraudulent and void as to his judgments, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the payment of the judgments, in like manner as in the case of equitable interests and assets which cannot be reached by execution. In the second class of cases, it is not necessary for the judgment creditor to first take out execution on his judgment, for it is already a lien on the land: *Dunham v. Cox*, 10 N. J. Eq. 437; 64 Am. Dec. 460; *Wadsworth v. Schisselbauer*, 32 Minn. 84; *Weightman v. Hatch*, 17 Ill. 281. In the latter case, which has been consistently adhered to in Illinois ever since, the court held that execution was not necessary to enable the judgment creditor to file his bill in such a case as this; that as to him, the conveyance being void, the creditor has the right to place himself in the same position which he would have occupied had it never been made, and first seek satisfaction out of the land. 'The grantee's title being tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed in his title. In this case the complainant was not bound to issue any execution whatever. He was as much entitled to the relief asked without it as with it. It was an immaterial averment in the bill, and need not be proved at the hearing.' The right of the plaintiff to maintain the action, if his judgments became a lien or a *quasi* lien, cannot be and is not seriously questioned. As the judgments were liens on the land, and no execution or levy was necessary to make them such, the plaintiff had a right to commence and maintain this suit. The lien would attach as certainly upon the docketing of the judgments, and as plainly so, as by issuing executions and delivering them to the sheriff, and the formal indorsement of a levy under them, which, as already shown, is not necessary in the case of real estate, the execution being a mere authority to sell that to which the judgments, by force of the statute, have already attached. The plaintiff has a right to have all doubts arising from matters, whether of record or *in pais*, in respect to his alleged lien removed, and to have his judgments declared legal liens binding the title, notwithstanding the obstacles fraudulently put in their way, so that no question may exist as to the liability of the land to be sold to satisfy them, to the end that purchasers at the sale may be able to bid intelligently, and the premises may bring their fair value. The right to maintain such an action is not founded upon or limited in the least degree by any statute of this state; it is given by general principles of equity jurisprudence applicable to the administration of remedies the law furnishes against fraud and fraudulent conveyances; nor are the statutes of New York in relation to the subjection of real estate or interests therein so much like our own as to entitle the decisions of the courts of that state to be considered binding as precedents. The law in that state on the point in question has been in an uncertain and unsettled condition, and decisions in that state might be cited, were it material, on either side of it. As late as 1881, in the case of *Royer Wheel Co. v. Fielding*, 61 How. Pr. 437, Van Vorst, J., an able and experienced judge, held that an execution was not essential to the maintenance of a judgment creditor's action to set aside fraudulent conveyances of real estate; and in *Mohawk Bank v. Atwater*, 2 Paige, 54, Chancellor Walworth decided that a creditor might file his bill to set aside a fraudulent conveyance of the real estate of his debtor as soon as he has obtained a judgment which is a lien

on the land, and that the judgment will continue to be a lien on the land after the statutory period of ten years, as against the defendant in the judgment or his grantees without consideration, but not as against *bona fide* purchasers or encumbrancers. In *McElwain v. Willis*, 9 Wend. 548, 653, Nelson, J., after stating what is essential to the maintenance of a regular creditor's bill, proceeds to say that 'if a bill is filed under the common-law powers of the court to remove an impediment in the way of a perfect remedy at law, interposed fraudulently or inequitably by the debtor, then it should be clearly shown that there was property upon which the judgment was or might have been a lien, if real, or the execution, if personal.' And until the case of *Adair v. Butler*, 87 N. Y. 585, in 1882, the question made on this record was regarded as one fit for a full discussion in the court of appeals. The plaintiff had, I am well satisfied, a valid lien on the lands in question as against these defendants; and if but a 'quasi lien,' as it is called in some of the cases like the present, he still had a right to invoke the power of a court of equity to protect and enforce it, and to declare him entitled to the same *status* and position in respect to his judgments as liens on the land in question as if the flagrant fraud set out in the complaint had not been perpetrated to prevent him from subjecting the land to the satisfaction of his debts. It is conceded that there are authorities both ways on the question. I think that the rule laid down in *Eastman v. Schettler*, 13 Wis. 324, more than thirty years ago, is the correct and better rule, both upon principle and authority, and that it should not now be departed from, when nothing is to be gained by it but the observance of a mere empty ceremony, — an idle formality, having no semblance of benefit or advantage to either party. I think that the complaint states a good cause of action, and that the order of the circuit court sustaining the demurrer of the defendant thereto should be reversed."

FRAUDULENT CONVEYANCES — CREDITORS' SUIT TO SET ASIDE. — When a judgment creditor brings an action to set aside, as fraudulent to creditors, a conveyance of real estate made by the debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance: *Bloom v. May*, 43 Minn. 397; 19 Am. St. Rep. 243, and note; note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 746.

CREDITORS' SUIT LIES TO REACH A DEBTOR'S INTEREST IN A TRUST FUND after the return of an execution unsatisfied at law: *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113, and note.

CREDITORS' SUIT — RETURN OF NULLA BONA ON JUDGMENT BEFORE RESORT TO. — A return of *nulla bona* on a judgment against one of two or more partners for partnership debts authorizes a resort to equity to reach property fraudulently disposed of by him: *Bates v. Cobb*, 29 S. C. 395; 13 Am. St. Rep. 742, and note. It is essential to the maintenance of a creditor's bill to reach equitable interests that it shall allege that execution has been returned unsatisfied on a judgment against the debtor: *Baxter v. Moses*, 77 Me. 465; 52 Am. Rep. 783, and note; *Vasser v. Handerson*, 40 Miss. 519; 90 Am. Dec. 351; *Massey v. Gorton*, 12 Minn. 145; 90 Am. Dec. 287, and extended note discussing creditors' bills and equity proceeding in aid of executions: *First Nat. Bank v. Dwight*, 83 Mich. 189; *Talcott v. Grant Wire etc. Co.*, 131 Ill. 248. On the hearing of a motion for a receiver in a judgment creditor's suit upon the bill and answer, before the time for replying has expired, the return by the sheriff of the execution unsatisfied is conclusive upon the defendant: *Rankin v. Rothschild*, 78 Mich. 11. In an action to set aside transactions alleged to have been made by a debtor to defraud his creditors, it is sufficient

to allege the fraud and collusion of the parties and the insolvency of the debtor; it is not necessary to allege that the plaintiff has recovered judgment and obtained a return of *nulla bona*: *Miller v. Hughes*, 33 S. C. 530.

FRAUDULENT CONVEYANCES—TAKING PROPERTY IN NAME OF THIRD PARTY.—If a debtor buys land, and pays for it with his own means, and with the intent of fraudulently placing it beyond the reach of his creditors, takes the title in the name of a third person, the land is subject to the debts of the fraudulent grantee, and the right of his creditors to have it sold in payment of his debts cannot be defeated by a subsequent reconveyance to his fraudulent grantor: *Kee v. Larkin*, 83 Ala. 142; 3 Am. St. Rep. 702, and note.

FRAUDULENT CONVEYANCES—WHETHER BINDING UPON THE PARTIES AND THEIR PRIVIES.—A conveyance for the purpose of defrauding the grantor's creditors is valid between the parties: *Lawton v. Gordon*, 34 Cal. 36; 91 Am. Dec. 670, and note; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; note to *Whitworth v. Thomas*, 3 Am. St. Rep. 729; extended note to *Gary v. Jacobson*, 30 Am. Rep. 517. A voluntary conveyance made to defraud creditors is void only as to prior and existing creditors and those intended to be defrauded: *Veorhis v. Michaelis*, 45 Kan. 255.

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2. **UNDISCLOSED PRINCIPAL.** — Where one contracts as agent without naming his principal, who is unknown, the contract inures to the benefit of the principal if ratified by him, and both are bound thereby. *Waddill v. Sebree*, 766.
3. **UNDISCLOSED PRINCIPAL, WHEN BOUND.** — When a person employs an agent to purchase land for him, and the agent purchases in his own name on terms acquiesced in by such undisclosed principal, including the payment of money to bind the purchase, to be forfeited upon default, the principal is bound, and may be compelled to specifically perform the contract of purchase; nor will the forfeiture of the earnest-money paid release the principal from his obligation to complete the purchase. *Waddill v. Sebree*, 766.
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 7. **NECESSITY FOR AGENT TO BORROW MONEY BEING NEGATIVED NO PRESUMPTION OF HIS AUTHORITY TO BORROW.** — Where it is proved that there was no necessity for an agent to borrow money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority. *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 85.
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3. **EXCEPTIONS TO JUDGE'S CHARGE.** — A bill of exceptions which shows that certain requests were made for instructions to a jury, and that "each and every of such instructions asked for the judge refused to give, except as given in the general charge, and the defendants, by their counsel, then and there duly excepted," and the general charge extends over thirteen pages, the exception is not sufficiently specific and certain. *Welcome v. Mitchell*, 913.
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7. **SUSTAINING OF DEMURRER TO COUNT OF COMPLAINT NOT PREJUDICIAL, EVEN THOUGH ERRONEOUS, WHEN.** — Where a complaint consists of two counts, both intended to represent the same cause of action, and the evidence shows that no recovery could be had upon the first count, the sustaining of a special demurrer to that count, even if erroneous, cannot be prejudicial error. *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 85.
8. **ACCEPTANCE OF STREET — PLEADINGS.** — Where, in an action against a city to recover damages caused by a change in the grade of a street, the declaration is drawn on the theory that the street was established when the alleged wrong was done, the plaintiff is bound by his pleading, and therefore cannot, on appeal, urge that the street was not established nor dedicated when the wrong was committed. *Stearns v. Richmond*, 758.
9. **DEMURRER OF DEFENDANT OVERRULED FOR WANT OF PRESENTATION, HOW FAR CONSIDERED ON APPEAL.** — When a defendant's demurrer to the plaintiff's complaint is overruled for want of presentation, the plaintiff having appealed from a judgment in favor of the defendant, the latter cannot urge any grounds of special demurrer, or any errors committed against him, for the purpose of sustaining the judgment erroneously.

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10. QUESTIONS OF FACT. — The supreme court of Ohio will not examine the evidence before a trial court, except to the extent of determining whether the finding of such court was supported by any evidence. If the evidence upon which the finding of the court was based consisted of proof of declarations of parties long since deceased, made at a remote period of time to persons who are now very aged, and who had no interest in the matter or in preserving such declarations in their memories, yet if such evidence satisfies the trial court of the existence of such declarations, the appellate court will not interpose to set aside a finding based thereon. *Shahan v. Sloan*, 517.

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3. ASSAULT WITH INTENT TO MURDER, PERSON INTENDED TO BE KILLED NOT BEING WHERE ACCUSED THOUGHT HE WAS. — When a policeman bores a hole in the roof of a building, in order to ascertain from observation

whether or not the occupant is conducting a gambling or lottery game therein, and such occupant, believing the policeman to be on the roof at the point of contemplated observation, fires his pistol at that spot with intent to kill, he is guilty of an assault with intent to commit murder, although the policeman was not at the spot when the shot was fired, but was upon another part of the roof. *People v. Lee Kong*, 165.

4. **CRIMINAL ATTEMPT FRUSTRATED BY UNKNOWN OBSTRUCTION.** — Where the criminal result of an attempt is not accomplished, simply because of an obstruction in the way of the thing to be operated upon, which is unknown to the aggressor at the time, the criminal attempt is committed. *People v. Lee Kong*, 165.

See MARRIAGE AND DIVORCE, 2.

ASSESSMENT.

See TAXES, 3.

ASSIGNMENT.

1. **ASSIGNMENT OF RIGHT TO BRING ACTION TO SET ASIDE SETTLEMENTS.** — If a life insurance corporation represents to holders of policies under the reserve dividend plan that specific sums are due to them, and they, believing such representations to be true, accept the sums so paid, and give receipts therefor purporting to be in full payment, when in fact a much greater sum was due to each of them, each has a claim against the insurance company capable of assignment, and may therefore vest in his assignee the right to maintain an action to set aside such receipts and to recover the residue due under the policy. *Metropolitan etc. Ins. Co. v. Fuller*, 196.
2. **ASSIGNEE OF CAUSES OF ACTION WHO AGREES,** in consideration of the assignments, at his own expense, to bring actions thereon, and to pay the assignors one half of the net proceeds of such actions, but reserves the right to reassign the claims if at any time he deems it advisable to give up the attempt to prosecute them, obtains a beneficial interest in such causes of action, and becomes the equitable and *bona fide* holder thereof. *Metropolitan etc. Ins. Co. v. Fuller*, 196.

See ESTATES; EXECUTION, 7; HUSBAND AND WIFE, 1; INJUNCTION, 3; INSOLVENCY, 2; JUDGMENTS, 22, 23; JUDICIAL SALES, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

ATTACHMENT, BURDEN OF PROOF TO SUSTAIN. — In a proceeding before a county court in Illinois, in the exercise of jurisdiction over assignments for the benefit of creditors, the court is justified in finding that attachment creditors have no valid lien upon the property attached, if they do not offer any evidence tending to prove debts due and owing from the defendant to the plaintiff in the attachment at the commencement of the suit. *Phume etc. Mfg. Co. v. Caldwell*, 305.

See JURISDICTION, 7.

ASSOCIATIONS.

1. **GOOD STANDING.** — The issuance of a certificate of endowment to a member is evidence of his good standing when it is issued, and such good standing will be presumed to continue, and the burden of establishing

its loss must be assumed by the association. *Independent Order of Foresters v. Zak*, 318.

2. **GOOD STANDING, LOSS OF, HOW MAY BE PROVED.** — Where the rules of a benefit association declare what shall be deemed conduct unbecoming a member of it, and that upon trial and conviction thereof he may be reprimanded, suspended, or expelled, and a certificate of endowment is issued to the member, stipulating for the payment of a specified sum to his wife upon his death, provided he shall remain in good standing at the time of such death, the payment of such certificate cannot be resisted on the ground that he was not in good standing, except by showing loss of such standing from the records, minutes, or proceedings of the order itself establishing such loss by the official action of the order. *Independent Order of Foresters v. Zak*, 318.
3. **MUTUAL BENEFIT SOCIETIES, RIGHT OF, TO CHANGE THEIR LAWS.** — Mutual benefit societies have the right to alter, amend, or repeal their laws, or to enact others consistent with the purpose for which they are organized, but they cannot so exercise this right as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members. *Wist v. Grand Lodge*, 603.
4. **IMPOSSIBLE COMPLIANCE, LAW NOT CONSTRUED TO REQUIRE.** — A law of a mutual benefit society will not be construed in such a way as to render it impossible for its members to comply with its requirements, if such a result can be avoided, especially where such a construction would operate as a complete destruction of the rights of the members, and as a repudiation by the society of its obligations. *Wist v. Grand Lodge*, 603.
5. **LAW NOT CONSTRUED TO BE RETROACTIVE UNLESS CLEARLY INTENDED TO BE SO.** — A new law of a mutual benefit society will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so, but such law will be construed as operating only on cases or facts that come into existence after it was passed. *Wist v. Grand Lodge*, 603.

ASSUMPSIT.

CONTRACT ENTERED INTO THROUGH THE MISTAKE OF THE PARTIES thereto respecting its contents is not binding upon them, and if one of them performs services for the other in consequence of such contract, he is entitled to recover reasonable compensation therefor, though in excess of the price named in the contract. *Rowland v. New York etc. R. R. Co.*, 175.

See JUDGMENTS, 27.

ATTACHMENT.

1. **RETURN UPON ATTACHMENT NOT CONCLUSIVE OF VALIDITY OF ATTACHMENT WHEN.** — The return upon a writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant. *Blanc v. Paymaster Mining Co.*, 149.
2. **GARNISHMENT OF JUDGMENT.** — THE SITUS OF A JUDGMENT for the purpose of garnishing it is only in the state wherein the judgment creditor resides; and where the debtor is an insurance corporation, the garnishment of it in another state in which it does not reside, upon service on one of its local agents in that state, is void. *Renier v. Hurlburt*, 850.
3. **GARNISHMENT OF A JUDGMENT** in a state in which neither the judgment creditor nor debtor resides, and wherein the judgment was not rendered,

effected by the service of process upon the agent of the debtor within the state, is void, when the cause of action upon which the garnishment was founded did not originate in the state where the action was commenced, and such action was not to enforce any contract entered into with reference to any subject-matter within that state. *Renier v. Hartbert*, 850.

4. **SHARES OF STOCK IN CORPORATIONS LIABLE TO GARNISHMENT AND EXECUTION.** — The statutes of Texas make provision for reaching and subjecting to creditors shares of stock in corporations, both by writs of garnishment and execution. *Keating v. J. Stone etc. Live-stock Co.*, 670.
5. **ANSWER OF CORPORATION GARNISHED TO STATE NUMBER OF SHARES OWNED BY DEBTOR.** — Where a corporation is the garnishee, it is required by the writ to answer what number of shares, if any, the debtor owns in the company, and the shares so ascertained, or so much thereof as may be necessary, may be ordered to be sold to satisfy the judgment rendered. *Keating v. J. Stone etc. Live-stock Co.*, 670.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS; JUDGMENTS, 27; JURISDICTION, 7.**

ATTORNEY AND CLIENT.

1. **POWER OF ATTORNEY TO COMPROMISE CLAIM AFTER JUDGMENT.** — An attorney, employed merely as such to collect a debt, has no power to compromise the claim after judgment. *Watt v. Brookover*, 811.
2. **ATTORNEY FEES STIPULATED TO BE PAID IF LEGAL PROCEEDINGS INSTITUTED, RECOVERABLE WHEN.** — The presentation of a claim properly proved up against the estate of a lunatic in the hands of a guardian constitutes the institution of legal proceedings for its collection, and entitles the holder of a note so presented to recover an attorney fee stipulated therein to be paid "if legal proceedings be instituted." *Morrill v. Hoyt*, 630.

See **WILLS, 2.**

AWARD.

See **LANDLORD AND TENANT, 2.**

BANKRUPTCY.

See **INSOLVENCY.**

BANKS.

See **CORPORATIONS, 7; ESTOPPEL, 4; PROCESS, 1.**

BENEFICIAL ASSOCIATIONS.

See **ASSOCIATIONS.**

BENEFICIARIES.

See **TRUSTS, 9-11.**

BILLS AND NOTES.

See **NEGOTIABLE INSTRUMENTS.**

BILLS OF EXCEPTIONS.

See **APPEAL, 3, 4.**

BONA FIDE PURCHASERS.

See NEGOTIABLE INSTRUMENTS, 4-6.

BONDS.

See INJUNCTION, 6, 7; VENDOR AND PURCHASER; WAGNER, 2.

BOUNDARIES.

See DEEDS, 4; WATERCOURSES.

BRIDGES.

See MUNICIPAL CORPORATIONS, 25.

BURDEN OF PROOF.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ASSOCIATIONS, 1; NEGOTIABLE INSTRUMENTS, 2.

CALLS.

See WATERCOURSES, 2.

CANCELLATION.

See ACTIONS, 2; EQUITY, 4; JURISDICTION, 5.

CARRIERS.

1. **CARRIER OF ANIMALS—CONTRACT LIMITING LIABILITY.**—A common carrier of live-stock cannot, by contract with a shipper, relieve itself in any manner from liability for damages arising from loss or injury resulting from its own negligence. *Chicago etc. R. R. Co. v. Witty*, 436.

2. **MISTAKE AS TO FREIGHT CHARGES TO BE PAID.**—If a person, desirous of shipping articles from one point to another over a railway, inquires at its office, of its freight cashier, what the charges will be, and the latter, in turn, inquires of the way-bill clerk, whose duty it is to know what such charges are, and the latter, misunderstanding the place to which shipment is to be made, gives an incorrect answer, according to which the charges are computed and paid in advance, the railroad company is not bound by the answer thus made, and may, after shipping the goods to the place designated, and there delivering or offering to deliver them, recover such additional sum as may be required to reasonably compensate it for the services rendered. *Rowland v. New York etc. R. R. Co.*, 175.

See INTERSTATE COMMERCE, 2; RAILROADS.

CERTIFICATE.

See ACKNOWLEDGMENT; ASSOCIATIONS, 1, 2.

CHAMPERTY.

A CONTRACT WHEREBY ONE PERSON agrees to prosecute actions on behalf of others for a share of the proceeds of such actions is not void for champerty, when it is not opposed to public policy, and a contract is not against public policy by which one person agrees to bring suits to recover balances claimed to be due other persons on life insurance policies, issued to them on the reserve dividend plan, such persons having ac-

cepted payment of less sums than were due them, and given receipts in full, relying on the statement of the insurer that the sums so paid were all that were due them. *Metropolitan etc. Ins. Co. v. Fuller*, 196.

CHARACTER.

See HOMICIDE, 8-11.

CHATTEL MORTGAGES.

1. **CONSIDERATION.** — A PRE-EXISTING DEBT, already due, is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage. *Henry v. Vliet*, 478.
2. **CONSIDERATION.** — RELEASE OF A SURETY on a note already due, in consideration of a chattel mortgage executed by the maker of the note, is a valuable consideration for the mortgage. *Henry v. Vliet*, 478.
3. **A PRIVATE SALE OF CHATTELS BY A MORTGAGOR, WITHOUT GIVING PREVIOUS NOTICE** thereof, as required by statute, is not void. The statute was enacted for the protection of the mortgagor, and he may waive its benefit, and elect not to claim it. *Welcome v. Mitchell*, 913.
4. **SALE ON INSUFFICIENT NOTICE — LIABILITY OF MORTGAGOR.** — A mortgagee of chattels must comply substantially with the requirement of the statute, including notice of sale, in foreclosing his mortgage, and if he fails to do so, and the property is sold for less than its value, the mortgagor is entitled to have the value of the property applied to the extinguishment of the debt, and if such value is greater than the mortgage debt, the mortgagee is liable to the mortgagor for the difference. *Coad v. Home Cattle Co.*, 465.
5. **NOTICE OF POSTPONED SALE.** — If a chattel mortgage sale is postponed, notice of such postponement, when a newspaper is published in the county where the sale is to take place, and the postponement is for sufficient time to permit, must be published in the paper in which the original notice of sale was given, and must be continued therein in each issue of the paper until the day of sale. *Coad v. Home Cattle Co.*, 465.
6. **OPTION TO FORECLOSE.** — When a chattel mortgage provides that upon default in the payment of interest for the space of three days after maturity, the whole debt shall have become due and payable, at the option of the mortgagee, he may declare the whole debt due, and bring an action to foreclose for such default in the payment of interest. *Coad v. Home Cattle Co.*, 465.

See FRAUDULENT CONVEYANCES, 1; INSURANCE, 2.

COLLATERAL ATTACK.

See JUDGMENTS, 1, 16, 18, 19; PROCESS, 3.

COLLATERAL SECURITY.

See MECHANIC'S LIEN 5.

COLLUSION.

See EQUITY, 1; INSOLVENCY, 2; JUDGMENTS, 8, 12.

COMMERCE.

See CONTRACTS, 24; INTERSTATE COMMERCE.

COMMON CARRIERS.

See CARRIERS.

COMMON LAW.

See NUISANCE, 2.

COMPROMISE.

See ATTORNEY AND CLIENT, 1.

CONDONATION.

See MARRIAGE AND DIVORCE, 2.

CONFIRMATION.

See EXECUTORS AND ADMINISTRATORS, 1; JUDICIAL SALES, 5.

CONFLICT OF LAWS.

See ATTACHMENT, 2, 3; CONTRACTS, 12, 14; INTEREST.

CONSIDERATION.

See APPEAL, 2; ASSIGNMENT, 2; CHATTEL MORTGAGES, 1, 2; CONTRACTS, 1-3; CREDITOR'S SUIT, 4; ESTATES, 3; FRAUDULENT CONVEYANCES, 1, 2, 4; NEGOTIABLE INSTRUMENTS, 1-5, 9; TRUSTS, 4.

CONSTITUTIONAL LAW.

See STATUTES.

CONSTITUTIONS.

CONSTITUTION DOES NOT LIMIT DURATION OF STREET-RAILWAY FRANCHISE.

— While section 7 of article 10 of the constitution of Texas is entirely prohibitory, and not permissive, still it is a clear recognition of the right of any city to give its consent to the use of its streets by street-railway companies, and it contains no limitation of the length of time for which such consent may be given. *Mayor v. Houston etc. R'y Co.*, 679.

See EMINENT DOMAIN, 1-4, 9; LEGISLATURE; MUNICIPAL CORPORATIONS, 19, 20; OFFICERS, 2, 3; PLEADING, 1; RAILROADS, 17.

CONSTRUCTION.

See ASSOCIATIONS, 4, 5; CONTRACTS, 15; MECHANIC'S LIEN, 1, 2; MUNICIPAL CORPORATIONS, 1.

CONTINUANCE.

See TRIAL, 12-14.

CONTRACTS.

1. CONSIDERATION. — ANY DAMAGE, OR ANY SUSPENSION OF A RIGHT, OR ANY LIABILITY TO A LOSS occasioned to one by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor. *Mascolo v. Montemuto*, 170.

2. CONSIDERATION. — A FORBEARANCE TO SUE, OR A DISMISSAL OF A SUIT already begun, is a sufficient consideration for a promise, though the

- promisor has no direct interest in the suit, and is not directly benefited by the delay. *Mascolo v. Montesanto*, 170.
3. **CONSIDERATION — INCREASE IN WAGES.** — When a father, largely interested in a manufacturing company by which his son is employed, promises the latter, after he has attained his majority, to increase his wages and to pay such increase personally as an inducement to the son to remain in the employ of the company, such promise is based upon a valuable consideration, and cannot be successfully assailed by subsequent creditors of the father. *Second Nat. Bank v. Merrill*, 870.
 4. **STATUTE OF FRAUDS — PAROL AGREEMENT CONCERNING PURCHASE OF LAND.** — A parol agreement between one who obtains the title to land in himself alone, and with his own means, and another, that the latter is to have an interest therein upon paying one half of the expenses incurred in acquiring the title, or that the purchase is to be made for their joint benefit, is void as being within the statute of frauds, and cannot be enforced as against the party obtaining the title. *Robbins v. Kimball*, 45.
 5. **STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR, WHEN WITHIN.** — A parol agreement not to be performed by either party within one year is within the statute of frauds and void; but if it is to be or has been performed by one or either of them within such period, it is not within the statute. *Dant v. Head*, 369.
 6. **STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR — CONSTRUCTION.** — A deed conveying a leasehold interest in a distillery, and reciting the transfer of the trade-mark used at such distillery, in consideration of one hundred dollars per year during eight unexpired years of the lease, is not a contract as to the trade-mark, within the statute of frauds, because it is not to be performed within one year, and the purchaser, after making one payment, cannot resist the second on that ground. *Dant v. Head*, 369.
 7. **STATUTE OF FRAUDS. — AN AGREEMENT NOT TO CARRY ON A PARTICULAR CLASS OF BUSINESS** on real property is not within the statute of frauds. It is not a contract for the transfer of lands or for some interest in them, nor is it an agreement not to be performed within one year. *Hall v. Solomon*, 218.
 8. **STATUTE OF FRAUDS ARE NOT APPLICABLE TO AN EXECUTED AGREEMENT.** *Bates v. Babcock*, 133.
 9. **STATUTE OF FRAUDS. — THE ACTS OF PART PERFORMANCE** which will take a parol contract out of the statute of frauds must be referable to and in part execution of the contract, and not referable to some other title, and must be prejudicial to the party claiming specific performance, and for which he would be liable to compensation in damages if the contract were not enforced. *Cutler v. Babcock*, 882.
 10. **STATUTE OF FRAUDS. — ACTS OF PART PERFORMANCE** which will take a parol agreement out of the statute of frauds must be such as clearly refer to some contract in relation to the subject-matter in dispute. If all the acts done are of such a character that they do not indicate that they were done in the performance of any contract or agreement respecting property rights of any kind, but were rather the manifestation of a benevolent and affectionate disposition on the part of a childless couple towards a grateful and affectionate child, placed in their custody by a destitute and homeless mother, then such acts cannot be referred to an alleged parol agreement to make such child their heir and leave it their property. *Shahan v. Swan*, 517.

11. **STATUTE OF FRAUDS—PART PERFORMANCE.** — THE RETENTION OF POSSESSION OF REAL PROPERTY under a parol contract for its transfer to the party so retaining it may amount to an act of part performance of such contract. *Outler v. Babcock*, 882.
12. **CONFLICT OF LAWS—VOID CONTRACT FOR SALE OF INTOXICATING LIQUORS.** — Where a contract for the manufacture and sale of beer in one state to be transported to another is void in the state where made, because prohibited by statute, it is void everywhere, and its invalidity is a good defense in an action on the contract in another state. *Tredway v. Riley*, 447.
13. **AGREEMENT NOT TO USE LAND FOR THE SALE OF INTOXICATING LIQUORS** does not prohibit the keeping of a drug-store, where liquors are sold in the manner in which they are ordinarily sold by druggists, but not to be drank upon the premises. *Hall v. Solomon*, 218.
14. **CONFLICT OF LAWS—PLACE OF CONTRACT, WHAT IS.** — A note dated and executed in one state, where both the maker and payee reside, and where, by its terms, it is made payable, is presumed to be a contract entered into and to be performed in that state, although it is secured by mortgage on property in another state, where it was delivered, and where the money constituting the loan was paid over. *Coad v. Home Cattle Co.*, 465.
15. **CONSTRUCTION WHEN TERMS ARE IN DOUBT.** — Where the terms of a parol agreement are in doubt, the acts of the parties in the execution of it are the best guides for its interpretation. *Robbins v. Kimball*, 45.
16. **EVIDENCE AS TO MEANING OF ABBREVIATIONS IN CONTRACT AND AS TO PRINTED MATTER THEREIN, WHEN ADMISSIBLE.** — Where printed matter, not described in the complaint, consisting of extracts from the rules of the Produce Exchange and Call Board of San Francisco, appears above the written contract pleaded in the complaint, and some of the witnesses testify that the phrase "S/87 wheat," used in the written contract, meant that the seller was to have the season of 1887 in which to complete his contract, and that the wheat should be "number one white wheat," and other witnesses testify that the phrase meant that the wheat was not to be delivered, but that the seller was simply to produce "call-board contracts" for the wheat, evidence ought to be admitted to show whether the printed matter above the manuscript was a part of the contract, or whether it should be considered a "board contract," or whether the phrase had any other meaning than that given to it by said board, and what that meaning is, and also to show what are the rules and regulations of the stock and exchange board, and it is error to exclude such evidence. *Berry v. Kowalsky*, 101.
17. **ABBREVIATIONS IN DESCRIPTION OF WHEAT NOT UNINTELLIGIBLE OR MEANINGLESS WHEN.** — The words, or abbreviations, "S/87 wheat," used in a pleading, cannot be said, on a special demurrer, to be unintelligible or meaningless, nor does their use render the pleading ambiguous or uncertain. *Berry v. Kowalsky*, 101.
18. **SURPLUSAGE, MEANINGLESS ABBREVIATIONS DISREGARDED AS, WHEN.** — Where a complete contract is expressed without abbreviations employed therein, they may be disregarded as surplusage, if they are meaningless. *Berry v. Kowalsky*, 101.
19. **MEANING OF WORDS IN CONTRACT SET OUT IN PLEADING NEED NOT BE PLEADED.** — Where a written agreement is fully set out in a pleading, the meaning of words or abbreviations used therein may be proved on

the trial for the purpose of enabling the court to interpret them, and the oral evidence of their meaning need not be stated in the pleading. *Berry v. Kowalsky*, 101.

20. **OPTION FOR SALE OF WHEAT, COMPLAINT IN ACTION FOR BREACH OF, WHEN SUFFICIENT.** — A complaint which alleges that the defendant executed a contract with the plaintiffs, and sets out a copy of the contract, which acknowledged the receipt of one hundred dollars, for which the defendant allowed the agent of the plaintiffs the privilege to deliver to the defendant, at any time within thirty days, five hundred tons of "S/87 wheat," at \$1.80 per cental, and which further alleges that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, which the defendant refused to pay, states a cause of action for the breach of a conditional agreement to buy the wheat at plaintiffs' option, and is sufficient as against a general demurrer. *Berry v. Kowalsky*, 101.
21. **CONTRACT IN RESTRAINT OF TRADE ILLEGAL WHEN.** — To render a contract void as being in restraint of trade, it is not necessary that it should create a pure monopoly, but it will be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract. *Texas etc. Oil Co. v. Adoue*, 690.
22. **CONTRACT IMPOSING UNREASONABLE RESTRICTIONS UPON TRADE VOID.** — A contract entered into between independent dealers and manufacturers in the same line of business, which imposes unreasonable restrictions upon trade and the freedom of the parties thereto, and whose manifest purpose and natural tendency are to prevent competition, and to reduce the price of raw materials and enhance that of the manufactured products by artificial means, to the disadvantage and detriment of the public, is contrary to public policy and void. *Texas etc. Oil Co. v. Adoue*, 690.
23. **COMBINATIONS TO STIFLE COMPETITION ILLEGAL.** — Combinations of individuals, formed for the purpose of stifling competition in trade, are against public policy and illegal. *Texas etc. Oil Co. v. Adoue*, 690.
24. **EXTENT OF TERRITORY NOT SOLE TEST OF REASONABLENESS OF RESTRICTIONS UPON TRADE.** — In regard to trade or commerce in articles of prime necessity or of very frequent use among a large number of people in any given locality, the extent of the territory is not the sole test by which to determine the reasonableness of the restraint of such trade. The effect of such restraint upon the interest of the public is a better test. *Texas etc. Oil Co. v. Adoue*, 690.
25. **PARTNERSHIP FOR DEALING IN LANDS MAY BE FORMED WITHOUT WRITING.** — A partnership may be formed for the purpose of dealing in lands by buying and selling lands generally, or it may be limited to a speculation upon a single venture, being, like any other contract of partnership, an agreement to share in the profit and loss of certain business transactions, and need not be in writing, under the statute of frauds, but may be formed by oral agreement, and its existence established by parol evidence. *Bates v. Babcock*, 133.

26. PARTNERSHIP FOR DEALING IN LANDS — EQUITABLE RIGHTS OF PARTNERS IN. — Although an agreement of partnership for dealing in lands does not create any interest or estate in lands, and a bill for the conveyance of lands cannot be maintained under it, yet by the subsequent acts of the parties rights are acquired in reference to the lands purchased in pursuance of the agreement which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud, by raising an equity superior to the legal title, and controlling that title in subordination to this superior equity. *Bates v. Babcock*, 138.

See AGENCY, 2-4, 8; ASSUMPSIT; ATTACHMENT, 3; CARRIERS, 1; CHAMPERTY; CORPORATIONS, 3; DAMAGES, 1-3; DEEDS, 1-3; ESTATES, 3; EXECUTION, 5; GUARANTY; INSANE PERSONS; INTEREST; JUDGMENTS, 10; LIMITATIONS OF ACTIONS, 1, 3; MASTER AND SERVANT, 3; MECHANIC'S LIEN, 3, 4; MUNICIPAL CORPORATIONS, 13, 14; NEGOTIABLE INSTRUMENTS, 4; RAILROADS, 1, 17; SPECIFIC PERFORMANCE, 1-5; TRIAL, 5; TRUSTS, 1-3; VENDOR AND PURCHASER, 1, 2; WAGERS; WATER COMPANIES, 1.

CONTRIBUTION.

See CO-TENANCY, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1, 5.

CONVERSION.

See DAMAGES, 10; PLEADING, 2; TROVER.

CONVEYANCES.

See DEEDS; ESTATES; EVIDENCE, 4; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 1, 2; MORTGAGE.

CORPORATIONS.

1. PLEDGE OR TRUSTEE OF STOCK LIABLE TO ITS CREDITORS AS REAL OWNER. — A person to whom stock of a corporation is issued, and in whose name the same stands on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee of the real owner. And therefore, in an action against a stockholder to subject the amount due from him for unpaid subscriptions to the capital stock to the payment of an unsatisfied judgment against the corporation, evidence is inadmissible to show that he was the real owner of only part of the shares of stock issued to him by the corporation, and that the other shares standing in his name were owned by other persons, and were issued to him for the purpose of negotiating a loan for the real owners. *Baines v. Babcock*, 158.

2. THE ATTITUDE OF A CORPORATION TOWARDS ONE OF ITS MEMBERS can be known only by its action as a corporation, and the only admissible evidence of such action is the records of the proceedings of the corporation itself. *Independent Order of Foresters v. Zak*, 318.

3. ACTS OF, BIND ITS STOCKHOLDERS, IN ABSENCE OF FRAUD. — A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligation of the corporation, it binds the stockholders

- as fully as in the making of contracts; and with its right to maintain and defend actions concerning its corporate rights or liabilities, the stockholders cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action. *Baines v. Babcock*, 158.
4. **LIABILITY OF STOCKHOLDERS UPON THEIR SUBSCRIPTIONS FOR STOCK SEVERAL, NOT JOINT.** — The liability of a stockholder of a corporation on his subscription for capital stock is several, and not joint; it is not, therefore, necessary that all of the stockholders should be made parties defendant to an action brought by a judgment creditor of a corporation, who has exhausted his legal remedies against it, to subject the amount due from the stockholders for unpaid subscriptions for stock to the payment of his judgment. *Baines v. Babcock*, 158.
 5. **A CORPORATION AUTHORIZED BY ITS CHARTER TO MINE COAL** has no greater rights than those of private persons engaged in the same business, and must, to the same extent as private persons, so carry on its business as not to injure other persons in the employment of their property rights. *Columbus etc. Coal etc. Co. v. Tucker*, 528.
 6. **PLEADING CORPORATE EXISTENCE.** — A corporation may sue or be sued in its corporate name without averring the act of incorporation. *Exchange Nat. Bank v. Copps*, 433.
 7. **OVER-DRAFT, NO OSTENSIBLE AUTHORITY OF AGENT TO MAKE, WHEN.** — There is no ostensible authority for a local agent of a steamship company to overdraw from a bank, where it appears that its general agents had no notice that he had an account with the bank, or that he had ever overdrawn the account, that he had furnished him with a safe in which to keep the money collected by him, and that the bank did not notify the general agents of the over-draft, but dealt with the local agent only, and accepted his individual note for the over-draft. *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 85.
 8. **NOTICE OF MEETING OF DIRECTORS — NECESSITY FOR.** — A mortgage of the property of a corporation authorized by a majority of its directors at a meeting of which a temporarily absent director had no notice is neither valid nor binding, in the absence of proof that it was impracticable to give him notice, and that an emergency and actual necessity demanded the immediate execution of the mortgage. *Bank v. McCarthy*, 60.
 9. **NOTICE OF MEETING OF DIRECTORS — SUFFICIENCY OF.** — In the absence of statutory or corporate regulation as to the mode of giving notice of the meetings of the directors of a corporation, personal notice must be given to each director, and written notice of a meeting left at a director's usual place of business, at a time when he and his family are absent to remain until after the time fixed for the meeting, is insufficient as notice to him, and renders the meeting held in his absence unlawful. *Bank v. McCarthy*, 60.
 10. **NOTICE OF MEETING OF DIRECTORS — WHEN CAN BE DISPENSED WITH.** — Notice to all the directors of a corporation of a business meeting thereof is generally necessary to its validity, and can only be dispensed with when it is impracticable to give such notice to the minority in a case of emergency, and when the act done in the absence of one or more of them not served with notice clearly appears to be reasonably necessary as well as proper to the welfare of the corporation. *Bank v. McCarthy*, 60.

11. **CREDITOR'S SUIT TO RECOVER UNPAID SUBSCRIPTIONS TO STOCK OF.** — A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. *Baines v. Babcock*, 158.
12. **EQUITABLE REMEDY OF CREDITOR OF, NOT SUPERSEDED BY SECTION 322 OF CIVIL CODE.** — The remedy given by section 322 of the Civil Code of California, which fixes the personal liability of the stockholders of a corporation, is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment. *Baines v. Babcock*, 158.
13. **CREDITOR OF, MAY RESORT TO EQUITABLE REMEDY AGAINST STOCKHOLDERS WITHOUT PURSUING STATUTORY REMEDY.** — A judgment creditor of a corporation who has exhausted his legal remedies against the corporation may resort to equity to enforce payment of subscriptions to the capital stock, without having first pursued his statutory remedy against the stockholders, and he proves that he has exhausted his legal remedies against the corporation by introducing in evidence his judgment against it, with the return unsatisfied of the execution issued thereon. *Baines v. Babcock*, 158.
14. **PLEADING — COMPLAINT NEED NOT ALLEGE PROCEEDING TO BE FOR BENEFIT OF ALL CREDITORS OF INSOLVENT CORPORATION WHEN.** — A complaint in an action in the nature of a creditor's bill to compel the subscribers to the capital stock of an insolvent corporation to pay in the unpaid portion of their subscriptions, to be applied to the satisfaction of a judgment obtained against the corporation, which alleges that the judgment debt exists, that the corporation is insolvent, that the subscribers owe a certain sum on their unpaid subscriptions, that the execution issuing on the judgment has been returned wholly unsatisfied, but which does not upon its face show that there are any other creditors of the corporation, states a cause of action, although it does not allege that the proceedings are for the benefit of all the creditors; and the question of defect in the pleading or of non-joinder of other creditors cannot be raised upon general demurrer to such complaint, but must be raised by answer. *Tatum v. Rosenthal*, 97.
15. **RETURN OF EXECUTION — CONCLUSIVENESS OF.** — In an equitable action by a judgment creditor of a corporation against its stockholders, the return of the execution issued upon his judgment unsatisfied is conclusive that he has exhausted his legal remedy, and it is not error for the trial court to refuse to allow the defendant to introduce evidence to show that the corporation was the owner and in possession of a large amount of personal property that might have been levied upon. *Baines v. Babcock*, 158.

See AGENCY, 1; ATTACHMENT, 1, 2, 4, 5; CREDITOR'S SUIT, 7; EMINENT DOMAIN, 2, 6; ESTOPPEL, 4; EXECUTION, 4; INJUNCTION, 4; JUDGMENTS, 9, 10, 26; MINES; MUNICIPAL CORPORATIONS, 11; PARTNERSHIP, 1; PROCESS, 1; TELEPHONE COMPANIES.

COSTS.

See WILLS, 2.

CO-TENANCY.

1. **TAX SALE — PURCHASE BY CO-TENANT.** — A co-tenant who purchases the whole of the common property, at a sale thereof for delinquent taxes, does not acquire any interest or title as against his co-tenants. *Cocks v. Simmons*, 28.
2. **TAXES — CONTRIBUTION.** — A tenant in common who pays the taxes against the whole of the common property is entitled to contribution from his co-tenants to the amount of the taxes due by each on his interest. *Cocks v. Simmons*, 28.

See ADVERSE POSSESSION, 1, 4.

COURTS.

See EQUITY, 5; EVIDENCE, 1; HABEAS CORPUS; HOMICIDE, 7, 11; INJUNCTION, 12, 13; JURISDICTION; MUNICIPAL CORPORATIONS, 18; NEGLIGENCE, 7; PARENT AND CHILD, 2; TRIAL, 2, 5, 7, 13, 14.

COVENANTS.

1. **DEEDS — GENERAL WARRANTY — EFFECT OF.** — When a deed conveys all the grantor's right, title, and interest in the land, and contains in general terms a covenant of general warranty, the covenant is restricted and limited to the interest conveyed, and does not warrant the title to all the land described in the deed. *Hull v. Hull*, 800.
2. **DEEDS — COVENANT OF GENERAL WARRANTY — EFFECT OF.** — A covenant of general warranty in a deed is intended to defend only the estate conveyed, and cannot enlarge that estate. *Hull v. Hull*, 800.
3. **COVENANT OF WARRANTY — EVIDENCE IN ACTION FOR BREACH OF.** — When an action for a breach of a covenant of warranty in a deed by an outstanding lease by the grantor is defended on the ground that the recital that the conveyance was made subject to such lease was kept out of the deed by the false and fraudulent representations of the grantee, his offer to prove that he had proposed to reconvey the land in dispute is properly rejected as immaterial. *Kyle v. Fehley*, 866.

CREDITOR'S SUIT.

1. **FRAUDULENT GRANTOR PROPER BUT NOT NECESSARY PARTY.** — A fraudulent grantor, though a proper, is not a necessary party defendant in an action to subject to the lien of the plaintiff's judgment property alleged to have been fraudulently conveyed. *Blanc v. Paymaster Mining Co.*, 149.
2. **SINGLE CREDITOR MAY FILE BILL WHEN.** — Where a fund can only be divided satisfactorily among a certain class of persons, the decree must be so framed that all those persons may be brought in for their distributive shares, but even then the bill may often be filed by any one of them on his own behalf. It is only when it subsequently appears to the court that a distribution must be made that a decree will be made for the benefit of all. *Tatum v. Rosenthal*, 97.
3. **JUDGMENT CREDITOR MAY FILE BILL AGAINST PERSONS HOLDING PROPERTY OF DEBTOR WHEN.** — A judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with

other judgment creditors, file a bill against persons holding property of the debtor which cannot be reached by execution. *Tatum v. Rosenthal*, 97.

6. **CREDITOR'S BILL TO REACH PROPERTY WHICH THE JUDGMENT DEBTOR HAS CONVEYED WITHOUT CONSIDERATION**, for the purpose of defrauding his creditors, cannot be sustained, when such conveyance antedates the judgment on which the plaintiff relies, and no execution had ever issued thereon. *Gilbert v. Stockman*, 922.
6. **CREDITOR'S BILL, WHEN A JUDGMENT CREDITOR HAS NOT A VALID LIEN ON THE PROPERTY**, cannot be sustained, unless an execution has been issued and returned wholly or partly unsatisfied. *Gilbert v. Stockman*, 922.
6. Whenever the nature of the property or thing in action is such or the same is held in trust for the insolvent judgment debtor so that it cannot be reached at law by levy and sale on execution, then the execution must be returned unsatisfied in whole or in part before a creditor's bill can be maintained to reach the same. *Gilbert v. Stockman*, 922.
7. **FRAUDULENT CONVEYANCE — RECOVERY OF JUDGMENT BY CREDITOR NOT NECESSARY TO ENABLE HIM TO ATTACK, WHEN.** — Although, as a general rule, a creditor must have first recovered judgment against his debtor, and have execution returned unsatisfied, before he can resort to an equitable action to reach property fraudulently transferred by his debtor, yet this rule does not apply to a case of a transfer of all the property of an insolvent corporation, without consideration, to a new corporation through the fraud of the managing agent of the insolvent corporation, as part of a scheme to cheat and defraud the creditors and other stockholders of such insolvent corporation. In such a case, the new corporation will be regarded by a court of equity as a continuation of the old one, and be held liable for its indebtedness to the extent of the value of the property that it received from it without consideration, although there has been no valid judgment against the old corporation for the amount of the claim. *Blanc v. Paymaster Mining Co.*, 149.

See CORPORATIONS, 11; JUDICIAL SALES, 2.

CRIMINAL LAW.

1. **PARTIES TO A CRIMINAL ACT CANNOT BE IN PARI DELICTO** when one of them could not consent to the act because he was not within the age of consent. *Mascolo v. Montesanto*, 170.
2. **INTOXICATION AS DEFENSE TO CRIME.** — Whenever a specific or particular intent is an essential element of a crime, voluntary intoxication may be considered with reference to the capacity or ability of the accused to form or entertain the particular intent, or upon the question whether or not the accused was in such a condition of mind as to form a premeditated design; for when a party is so intoxicated as to be unable to form or entertain the essential intent, such intent cannot exist, and no crime to which it is necessary can be perpetrated. *Garner v. State*, 231.
2. **HOMICIDE — INTOXICATION AS DEFENSE.** — Voluntary intoxication, as distinguished from a state of fixed and settled frenzy or insanity, either permanent or intermittent, does not excuse homicide, or any other crime which, but for intoxication, would be criminal, although the immediate effect of the intoxication is to render its subject unconscious, for the time, of what he is doing, or temporarily insane. This rule applies

whenever the doing of the wrongful act voluntarily constitutes the crime, or a particular or specific intent is not an essential element of the offense; and in all such cases a person who is, at the time of the commission of the crime, unconscious or insane as the immediate consequence of the voluntary intoxication is liable in the same manner and to the same extent that he would be if sober. *Garner v. State*, 231.

See ASSAULT; HOMICIDE; TRIAL, 3, 4, 6, 7; WITNESSES, 3, 5.

CUSTOM.

1. A USAGE WHICH IS NOT ACCORDING TO LAW, though universal, cannot be set up to control the law. *Columbus etc. Coal etc. Co. v. Tucker*, 528.
2. A CUSTOM OF COAL MINERS TO SO PLACE SLACK AND OTHER REFUSE from their mines that they may be washed down upon and injure the lands of others is not lawful, and constitutes no defense to an action by a land-owner to recover damages resulting to him from slack and refuse being so placed that it was washed down upon and injured his land. *Columbus etc. Coal etc. Co. v. Tucker*, 528.
3. NEGLIGENCE. — One charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or placed in like circumstances, or owing similar duties. *Columbus etc. Coal etc. Co. v. Tucker*, 528.

See RAILROADS, 14.

DAMAGES.

1. SALES — BREACH OF CONTRACT — MEASURE OF DAMAGES. — Upon the breach of a contract to furnish goods, the measure of damages, when similar goods may be purchased in the market, is the difference between the market price at the place of delivery and the contract price agreed to be paid. *Trigg v. Clay*, 723.
2. SALES — BREACH OF CONTRACT — MEASURE OF DAMAGES. — Upon the breach of a contract to furnish goods which have been resold by the buyer before delivery, and he cannot purchase similar goods in the market, the measure of damages is the difference between the contract price and the price at which they have been resold. *Trigg v. Clay*, 723.
3. SALE — MEASURE OF DAMAGES FOR BREACH OF CONTRACT OF. — All damages resulting necessarily, immediately, and directly from the breach of a contract of sale are recoverable, but not those that are contingent and uncertain. *Trigg v. Clay*, 723.
4. DEATH, DAMAGES ALLOWABLE FOR CAUSING. — In an action for negligence, whereby the death of plaintiff's intestate was caused, damages based upon the value of the life of the decedent to his wife and children should not be assessed. *McMilligott v. Randolph*, 181.
5. FOR DEATH OF RELATIVE LIMITED TO ACTUAL PECUNIARY INJURY SUSTAINED. — In an action to recover damages for the death of a relative, caused by negligence, the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury. but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; sorrow and mental anguish caused by the death are not elements of damage, and nothing can be recovered as a *solatium* for wounded feelings; and loss of society can only be considered for the purpose of estimating the pecuniary loss. It is therefore error, in an action by a mother to recover damages for the death of

her minor daughter, to charge the jury that it is not limited by the actual pecuniary injury sustained by the plaintiff by reason of the death of her child. *Morgan v. Southern Pac. Co.*, 143.

6. **FOR DEATH CAUSED BY NEGLIGENCE — CHILDREN.** — In an action to recover damages for the death of a married man, caused by the negligence of his employer, the fact that he left children surviving, whose support will be thrown upon his widow, may be shown in evidence and considered by the jury, but the damages recoverable are those which the widow has suffered alone, and not such as may have been suffered by "her and her children." *Abbot v. McCaulden*, 910.

7. **FOR FUTURE DISABILITY.** — The future effect of an injury must be shown with reasonable certainty, to authorize a recovery of damages for a permanent injury. A mere conjecture, or even a probability, does not warrant the giving of damages for a future disability, which may never be realized. *Louisville etc. R. R. Co. v. Minogue*, 378.

8. **MEASURE OF PARENT'S DAMAGES FOR LOSS OF HIS CHILD'S SERVICES.** — The measure of a parent's damages for injuries to his child, resulting in loss of service to him, is the amount which the child would have earned during his minority if the injuries had not been inflicted. The board of the child should not be deducted from that amount. *Texas etc. R'y Co. v. Brick*, 675.

9. **DEATH OF MINOR CHILD, DAMAGES RECOVERABLE FOR.** — In an action by a parent for the death of a minor child, the main element of damage is the probable value of the services of the deceased until he attains his majority, considering the cost of his support and maintenance during the early and helpless part of his life. *Morgan v. Southern Pac. Co.*, 143.

10. **MEASURE OF DAMAGES FOR SHERIFF'S REFUSAL TO DELIVER ENCUMBERED PROPERTY SOLD BY HIM.** — When a sheriff sells encumbered property, and refuses to deliver possession thereof to the purchaser, and the latter sues him for conversion, the measure of damages is the excess of the value of the property over the amount of the lien, with interest from the date of the conversion. *Brooks v. Lewis*, 650.

11. **WRONGFULLY PROTESTING NOTE BEFORE IT IS DUE GIVES RIGHT TO NOMINAL DAMAGES ONLY.** — The mere act of wrongfully protesting a promissory note before it is due gives a right of action for nominal damages only, where no special damages are alleged. *Hirshfield v. Fort Worth Nat. Bank*, 660.

12. **DUTY OF PARTY INJURED TO USE CARE AND MEANS TO AVOID INJURY.** — A person is bound to use ordinary and reasonable care and means to prevent an injury and the consequences of it, and he can only recover damages for such losses as could not by such care and means be avoided, but what constitutes such care and means is a question for the jury to decide. And while it may be the duty of the injured party to incur a moderate expense to protect himself from damages, what may be treated as moderate will depend upon many considerations, and must be determined by the peculiar circumstances of each case. *Cooper v. Dallas*, 645.

13. **VERDICT NOT EXCESSIVE WHEN.** — A verdict of twelve hundred dollars recovered by a father for injuries to his minor son lacking a few days of being nineteen years old when the accident occurred, the injuries consisting of the permanent and serious impairment of the right arm and the loss of a foot, is not excessive. *Texas etc. R'y Co. v. Brick*, 675.

14. **EXCESSIVE DAMAGES, AWARDING OF, GROUND FOR REVERSAL, WHEN.** — When the amount of damages awarded in an action for negligence is

obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive. A verdict of twenty thousand dollars, in an action by a mother for the death of her daughter, two years old, alleged to have been caused by the negligence of the defendant, will be set aside as excessive, especially where the complaint alleges no special damage, and no evidence whatever is introduced or offered upon the subject of damage. *Morgan v. Southern Pac. Co.*, 143.

See APPEAL, 8; CARRIERS, 1; CONTRACTS, 1, 9; CUSTOM, 2; EMINENT DOMAIN; EVIDENCE, 7; HIGHWAYS, 2; INJUNCTION, 2, 6, 7; LANDLORD AND TENANT, 1; LIBEL, 2, 3; LIMITATIONS OF ACTIONS, 2, 4, 5; MINES; MUNICIPAL CORPORATIONS, 19-21, 23, 24; NEGLIGENCE, 2, 3; NEW TRIAL, 2, 3; PARENT AND CHILD, 4; RAILROADS, 12, 15; REAL PROPERTY, 2; WATER COMPANIES, 2.

DEATH.

See DAMAGES, 4-6; PARENT AND CHILD.

DÉBRIS.

See CUSTOM, 2; MINES.

DEBTOR AND CREDITOR.

1. INSURANCE ON HUSBAND'S LIFE — VALIDITY AS AGAINST CREDITORS. — When a husband who has insured his life for the benefit of his wife and children dies insolvent, the insurance is valid against his antecedent or existing creditors, if, at the time it was procured, his indebtedness was not such as to affect his credit or ability to pay his debts, and the amount invested in the insurance was not such as to materially affect the rights of creditors. *Hise v. Hartford etc. Ins. Co.*, 358.
 2. INSURANCE, WHEN A FRAUD ON CREDITORS. — Under the Kentucky statute, insurance on his life, made by a husband, whether insolvent or not, for the benefit of his wife and children, is valid as against his creditors, unless the insurance is made to defraud them, in which case only the premiums paid shall be subject to his debts. In such case, insurance in unreasonable sums, made by an insolvent husband, is sufficient evidence of fraud to subject the premiums paid to the payment of his debts. *Hise v. Hartford etc. Ins. Co.*, 358.
- See ATTACHMENT, 2, 3, 5; CONTRACTS, 3; CORPORATIONS, 1; EXECUTION, 1-3, 6, 7; FRAUDULENT CONVEYANCES; HOMESTEAD, 1; HUSBAND AND WIFE, 3; INSOLVENCY; JUDGMENTS, 6, 7, 10-12, 14, 24, 25; JUDICIAL SALES, 1, 2; MECHANIC'S LIEN, 1, 5; MORTGAGES; TRUSTS, 9, 11.

DECEASED PERSONS.

See JUDGMENTS, 1, 2.

DECEDENT ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DECLARATIONS.

See APPEAL, 10; EVIDENCE, 5-8.

DECREE.

See JUDGMENTS.

DEDICATION.

EMINENT DOMAIN — IMPROVEMENT OF DEDICATED STREET. — The voluntary dedication of a street as a highway constitutes it, to the extent that it is necessary to be used as a street, the property of the people of the state, and carries the continuing power to change its grade, or to otherwise improve it for street purposes. This power may be delegated by the legislature to municipalities, and to its exercise the abutting owner is at all times subject, without becoming entitled to additional compensation. *Selden v. Jacksonville*, 278.

See APPEAL, 8; HIGHWAYS, 1.

DEEDS.

1. **CONVEYANCES, INTERPRETING, BY THE INTENTION OF THE PARTIES.** — A deed must, if possible, be so construed as to effectuate the intent of the parties, and in arriving at the intent expressed or implied in the language used, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. *Bartholomew v. Mummy*, 206.

2. **CONSTRUCTION.** — A grantor who owns the undivided four fifths of land, and conveys, with covenants of general warranty, "a full half-interest in all the right, title, and interest in and to" the land, conveys an undivided half-interest in the land, and not in his interest. *Cocks v. Simmons*, 28.

3. **DEED INTENDED AS A MORTGAGE — STATUTE OF FRAUDS.** — A verbal agreement, by which the grantee in a deed is to reconvey the land to the grantor upon payment by the latter of indebtedness to the former, is a contract for the sale of lands, and void as being within the statute of frauds. Parol evidence is inadmissible, in the absence of an allegation of fraud or mistake, to show that a deed absolute on its face was intended merely as a mortgage. *Crutcher v. Muir*, 366.

4. **BOUNDARIES — PRESUMPTION.** — It is not presumed that a party granting land intends to retain a mere narrow strip between the land sold and his boundary line, in the absence of express provision to that effect in the deed, and especially when it would cut off the grantee from valuable water privileges. *Brown Oil Co. v. Caldwell*, 793.

See ACTIONS, 2; CONTRACTS, 6; COVENANTS; DURESS; EVIDENCE, 4; INSANE PERSONS, 2; JURISDICTION, 5, 6; LIMITATIONS OF ACTIONS; MISTAKE, 2; VENDOR AND PURCHASER, 1-3.

DEEDS OF TRUST.

See ACKNOWLEDGMENT; APPEAL, 2; EQUITY, 3; MORTGAGES; TRUST, 5-7.

DEFINITIONS.

"All buildings." *Atascosa County v. Angus*, 637.

Assault. *People v. Lee Kong*, 165.

"Call-board contracts." *Berry v. Kowalsky*, 101.

"Cashier." *Blanc v. Paymaster Mining Co.*, 149.

"Communications." *Commonwealth v. Sapp*, 405.

- "Duly sworn." *Garner v. State*, 232.
 Encroachment. *Chase v. Oshkosh*, 898.
 "Executed." *Bensimer v. Fell*, 774.
 "For the recovery of real property." *McLaughlin v. McCreary*, 66.
 Habitual drunkenness. *McBee v. McBee*, 612.
 Head of family. *Bosquett v. Hall*, 404.
 Hearsay. *Ehrlinger v. Douglas*, 863.
 "Her and her children." *Abbot v. McCadden*, 910.
 "If legal proceedings be instituted." *Morrill v. Hoyt*, 639.
 "Mensdorffer Act." *State v. George*, 586.
 "Number one white wheat." *Berry v. Kowalsky*, 101.
 Obstruction. *Chase v. Oshkosh*, 898.
 "S/87 wheat." *Berry v. Kowalsky*, 101.
 "Signed." *Bensimer v. Fell*, 774.
 Solatium. *Morgan v. Southern Pac. Co.*, 142.
 Wagon. *Kitchen v. Loudenback*, 540.

DEVISE.

WILLS. — MISTAKE OF DESCRIPTION IN WILLS, either of the beneficiaries or of the subject-matter of the devise, will not avoid it, if enough remain to show with reasonable certainty what was intended. Thus a devise of lots 4, 9, and 10 in a certain block will pass lots 2, 9, and 10 in the same block, when the latter are all the lots owned by the testator in that block. *Sabree v. Fedawa*, 488.

See ESTATES, 3; TRUSTS, 2; WILLS.

DIRECTORS.

See CORPORATIONS, 8-16.

DISCRIMINATION.

See MUNICIPAL CORPORATIONS, 2-6.

DISSOLUTION.

See INJUNCTION, 8-12.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOGS.

See EVIDENCE, 2.

DOWER.

See ESTATES AND ADMINISTRATORS, 2, 3; JUDGMENTS, 21, 22; JUDICIAL SALES, 1.

DRAINS.

See EMINENT DOMAIN, 2.

DRUGGISTS.

See CONTRACTS, 12.

DRUNKENNESS.

See MARRIAGE AND DIVORCE, 7.

DURESS.

DURESS OF IMPRISONMENT cannot exist when the imprisonment is lawful. If, therefore, a man, supposing he has a right of action against another, causes him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid it for duress of imprisonment, although in fact plaintiff had no right of action. *Mascolo v. Montecanto*, 170.

EASEMENTS.

See EMINENT DOMAIN, 6, 9; HIGHWAYS, 2; MUNICIPAL CORPORATIONS, 18; RAILROADS, 18.

ELECTION.

See TRUSTS, 6.

ELECTRIC RAILWAYS.

See MUNICIPAL CORPORATIONS, 10.

EMINENT DOMAIN.**1. STREET IMPROVEMENT NOT AN APPROPRIATION OF PRIVATE PROPERTY.**

— A constitutional guaranty that private property shall not be taken without compensation does not extend to consequential damages resulting to abutting property from authorized or lawful changes of the grade of the street or other street improvement by municipal authority. *Selden v. Jacksonville*, 278.

2. IMPROVEMENT OF STREETS — CONSTITUTIONAL LAW. — Under constitutional provisions that private property shall not be taken without compensation, and that the legislature may provide for the drainage of the land of one person over or through that of another upon compensation to the former, and that no private property or right of way shall be appropriated to the use of any corporation or individual without full compensation to the owner, irrespective of any benefit from any improvement proposed by such individual or corporation, a municipal corporation is not liable for consequential damages resulting to abutting property owners from a lawful change of the grade of the street by means of the erection of a viaduct, or other authorized improvement of the street for street purposes. *Selden v. Jacksonville*, 278.

3. IMPROVEMENT OF STREETS — WHAT DOES NOT CONSTITUTE APPROPRIATION. — So long as there is no application of a street to purposes other than those of a highway, and no diversion of it from street purposes, any changes of grade made lawfully and in good faith, or not maliciously, or for the purpose of doing injury to the abutter, are not within the constitutional prohibition against taking private property without compensation, nor the basis for an action of damages. *Selden v. Jacksonville*, 278.

4. STREET IMPROVEMENT — WHAT NECESSARY TO A TAKING OF PRIVATE PROPERTY. — A trespass upon, or physical invasion of, property abutting on a street is necessary to bring municipal authorities, when improving streets, within a constitutional prohibition against taking private

property without compensation. So long as such authorities keep within the scope of their powers in using or improving the street for street purposes, they are under no liability to abutting owners for any damage resulting from a change of grade or other improvement in the street, made for the convenience or benefit of the public in using it as such. *Selden v. Jacksonville*, 278.

5. **IMPROVEMENT OF STREETS. — CONSEQUENTIAL DAMAGES** involved in the lawful improvement of a street for street purposes are merely the consequence of a legal act, and not a taking of property. They cannot form the basis for a recovery in the courts, nor of a lawful claim for compensation. *Selden v. Jacksonville*, 278.

6. **STREET IMPROVEMENT — ERECTION OF VIADUCT NOT APPROPRIATION WITHOUT COMPENSATION.** — An authorized erection of a viaduct in a street, by a municipal corporation, for the purpose of changing the grade of the street for street purposes, is not a taking of the property of the abutting owner without compensation which entitles him to consequential damages, although his incidental rights of ingress and egress, light and air, are destroyed thereby, and other corporations besides the municipality have contributed to the expense of building such viaduct. *Selden v. Jacksonville*, 278.

7. **VIADUCT AS DIVERSION OF STREET FROM STREET PURPOSES — APPROPRIATION WITHOUT COMPENSATION.** — Where the necessity for a viaduct in a street is created by railroad tracks crossing the street, the erection of such viaduct by a municipality, financially aided by the railroad company, would seem to be a diversion of the street from street purposes, and a taking of private property without compensation, which would entitle the abutting street owner to consequential damages. *Selden v. Jacksonville*, 278.

8. **LATERAL SUPPORT — REMOVAL OF, IN CONSTRUCTING PUBLIC WORKS — DAMAGES.** — When, in the authorized execution of public works, excavations are made, and the soil of a private individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and he is entitled to damages for the injury sustained. *Stearns v. Richmond*, 758.

9. **IMPROVEMENT OF STREETS. — INCIDENTAL RIGHTS OF ABUTTING OWNERS** on streets to egress and ingress from and to the property by way of the street, and of light and air which the street affords, are not possessed by the public. These rights are protected by a constitutional prohibition against taking private property without compensation, subordinate only to the right of the state, or any authorized municipal or governmental agency acting for it, to alter the grade or otherwise improve the street for street purposes. *Selden v. Jacksonville*, 278.

See **DEDICATION**; **HIGHWAYS**, 1, 2; **LANDLORD AND TENANT**, 2-4; **NEW TRIAL**, 1.

ENCUMBRANCES.

See **INSURANCE**, 1, 2, 5.

ENTIRETY.

See **INSURANCE**, 1-3.

EQUITY.

1. JUDGMENT AGAINST A MUNICIPAL CORPORATION will not be enjoined in equity at the instance of a tax-payer on the ground that the municipality had a good defense to the original action, in the absence of allegations showing that the judgment was the result of fraud or of collusion between the judgment creditor and the municipality or its officers. *Carney v. Marseilles*, 328.
 2. JUDGMENT. — EQUITY WILL NOT ENJOIN THE COLLECTION of a judgment on the ground that the applicant for relief had a defense to the action at law which he failed to plead, in the absence of fraud or mistake of fact by which he was prevented from interposing it. *Carney v. Marseilles*, 328.
 3. TRUST DEED — DEATH OF GRANTOR NOT REVOCATION OF POWER OF SALE IN. — The death of the grantor does not operate as a revocation of a power of sale contained in a deed of trust, nor limit the effect of the deed, and therefore the failure to present to the administrator of the deceased the claims secured by it furnishes no ground for a court of equity to cancel the deed. *More v. Calkins*, 128.
 4. LACHES — WHAT CONSTITUTES — DISCRETION OF COURT. — What delay in bringing suit will constitute such laches as will bar relief, in the absence of the defense of the statute of limitations by plea or demurrer, depends upon the facts and circumstances of each particular case, and is within the sound discretion of the court to determine. *Gibson v. Herriott*, 17.
 5. LACHES BY HOLDER OF EQUITABLE TITLE. — The delay of a party holding the equitable title to land, in standing by and permitting the owner of the legal title to expend large sums in improving and developing the property until it has largely increased in value without notice of his claim, will constitute such laches as will bar relief. *Gibson v. Herriott*, 17.
 6. LACHES BY HEIRS — PURCHASE BY ADMINISTRATOR. — When an administrator has become interested, by purchase, in land of the estate, after its sale by him, but before its confirmation, an unexplained delay of seven years by adult heirs in permitting such administrator to pay the debts of the estate and to permanently improve the property purchased, until it has greatly increased in value, without notice of their claim, is such laches as will bar their right to avoid such sale, although the statute of limitations is not interposed by plea or demurrer. *Gibson v. Herriott*, 17.
- See ACTIONS, 2; CONTRACTS, 26; CORPORATIONS, 12, 13; CREDITOR'S SUIT, 7; ESTATES, 3; INJUNCTION; JURISDICTION, 4-6; MISTAKE; PARTNERSHIP, 2, 4, 6; SPECIFIC PERFORMANCE, 4, 5.

ERROR.

See APPEAL; INJUNCTION, 10; JUDGMENTS, 19; TRIAL.

ESCAPE.

See HOMICIDE, 1-3.

ESTATES.

1. CONVEYANCE OF AN ESTATE TO COMMENCE IN THE FUTURE. — By the common law, any limitation by which an estate of freehold in corporeal

hereditaments purports to be so granted as to commence upon the expiration of a fixed interval of time after the execution of the grant, or upon the happening of some future contingency, other than the determination of the precedent estate of freehold, was void in its inception. *Bartholomew v. Mussy*, 206.

2. **CONTINGENT REMAINDERS, TRANSFERS OF.** — If two persons have the use of property for their joint lives, with a contingent remainder to the survivor of them, one of them may release to the other his interest in the property, present and future. *Bartholomew v. Mussy*, 206.
3. **CONTINGENT REMAINDERS AND EXECUTORY INTERESTS WERE NOT ASSIGNABLE** at the common law, though they might, as possibilities coupled with an interest, be devised under the English statute of wills, or released at common law, or bound by a conveyance operating by way of estoppel, and contracts, and assurances relating to them, based upon valuable consideration, might generally be enforced in equity. *Bartholomew v. Mussy*, 206.
4. **CONTINGENT REMAINDER, WHEN ASSIGNABLE.** — When the person is ascertained who is to take if the event happens, the remainder may be granted, and the grantee takes the place of the grantor, with his chance of having the estate. *Bartholomew v. Mussy*, 206.

See COVENANTS, 1, 2.

ESTOPPEL.

1. **CONSTRUCTIVE NOTICE.** — FALSE REPRESENTATIONS, if relied upon by a party ignorant of the truth, may create an estoppel in his favor, although he had constructive notice of their falsity by matter of record. *Graham v. Thompson*, 40.
2. **FALSE REPRESENTATIONS — NOTICE.** — One who claims the benefit of an estoppel, on account of representations made, must show that he was ignorant of the truth and acted in reliance upon such false representations. Such estoppel can be defeated only by actual and not by constructive notice of the falsity of the representations. *Graham v. Thompson*, 40.
3. **ESTOPPEL TO DENY TITLE — CREDIT ON FALSE REPRESENTATIONS.** — One who induces another to extend credit to a third person, by representing the latter to be the owner of land, will be estopped, after such representations have been acted upon, from denying such ownership. *Graham v. Thompson*, 40.
4. **CORPORATIONS — CAPACITY.** — The maker of a note payable to a bank cannot, in an action on the note, question the incorporation by demurrer. *Exchange Nat. Bank v. Capps*, 433.

See APPEAL, 8; ESTATES, 3; MUNICIPAL CORPORATIONS, 26.

EVIDENCE.

1. **JUDICIAL NOTICE.** — The court can take judicial notice of the uses of an air-gun which is of the kind usually kept for sale by toy and hardware merchants, to be sold as a toy to be used by boys. *Harris v. Cameron*, 391.
2. **HEARSAY, WHAT IS.** — A statement by a wife to her husband, that a dog was in the house, that she could not drive him out, and that he had snapped at her, is hearsay, and is not admissible, in an action against the husband for killing the dog, for the purpose of showing that it had not snapped at his wife. *Ehrlinger v. Douglas*, 863.

3. **UNCHASTITY OF WIFE.** — When the wife has not been called as a witness on the trial of her husband, charged with having attempted to poison her, evidence of her unchastity is inadmissible. *Commonwealth v. Sapp*, 405.
 4. **CONVEYANCE, RESTRICTING, BY PAROL.** — A PAROL AGREEMENT, BEING PART OF THE CONSIDERATION OF A SALE restricting the use of the premises in some particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land, and the admission of parol evidence to prove such an agreement is not an infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written agreement. *Hall v. Solomon*, 218.
 5. **RES GESTÆ.** — A DECLARATION, TO BE ADMISSIBLE AS PART OF THE RES GESTÆ, must grow out of the principal transaction, illustrate its character, and must be contemporary with it, and derive some credit from it. A declaration of a third person, before the principal act occurs, cannot be admissible as evidence in favor of the person by whom the principal act was done as part of the *res gestæ* thereof. *Mhrlinger v. Douglas*, 863.
 6. **DECLARATIONS OF A VENDOR MADE AFTER HE HAS TRANSFERRED PROPERTY** are not admissible, as against his transferee, to impeach the transfer. *Welcome v. Mitchell*, 913.
 7. **EXPRESSION OF PAIN.** — In an action to recover damages for personal injury, declarations made by the party injured, at or near the time of the accident, as to his present pain or injury, are admissible to show its existence; but whether the pain was real or feigned is for the jury to determine. *St. Louis etc. R'y Co. v. Murray*, 32.
 8. **NEGLIGENCE — DECLARATIONS OF PARENT.** — In an action by a child or its personal representative to recover for negligent injury to it, the declarations of the mother of the child, made immediately after the accident, are merely hearsay, and not admissible in evidence. *Norfolk etc. R. R. Co. v. Groseclose*, 718.
 9. **A SWORN PLEADING** of a party to one action is admissible in evidence against him in another action as an admission, subject to rebuttal and explanation. *Gibson v. Herriott*, 17.
 10. **RECORD OF JUDGMENT OF ANOTHER STATE AGAINST HEIRS.** — A record of a judgment against heirs in one state, authorizing the sale of a decedent's lands situated there for the payment of his debts, is not admissible as against such heirs in an action in another state to subject the lands of the decedent situated therein to the payment of the same debts, either for the purpose of establishing them or fixing their amount. *Hull v. Hull*, 800.
 11. **VOID JUDGMENT IN ANOTHER STATE.** — A judgment or decree rendered in one state, authorizing the sale of a decedent's lands there to pay his debts, but which is void as to his heirs, is not admissible against them in a suit in another state to subject the lands of the decedent situated there to the payment of the same debts. *Hull v. Hull*, 800.
- See** AGENCY, 4, 5, 7; APPEAL, 4, 7, 9, 10; ASSIGNMENT FOR BENEFIT OF CREDITORS; ASSOCIATIONS, 1; CONTRACTS, 16, 19, 25; CORPORATIONS, 1, 2, 13, 15; COVENANTS, 3; DEBTOR AND CREDITOR, 2; DEEDS, 1, 3; HOMICIDE, 4-10; INSANE PERSONS; JUDGMENTS, 10; NEGLIGENCE, 3, 7, 8; NEW TRIAL, 4; PARTNERSHIP, 5; PLEADING, 2; RAILROADS, 14; TRIAL, 2, 5; TRUSTS, 2; WILLS, 1; WITNESSES.

EXCEPTIONS.

See **APPEAL**, 3, 4; **INJUNCTION**, 8.

EXECUTION.

1. **PROPERTY BOUGHT AND PAID FOR BY A DEBTOR**, the title to which he takes in the name of another, with intent to hinder, delay, and defraud creditors, cannot be reached and sold under execution against such debtor. *Gilbert v. Stockman*, 922.
2. **SHARES OF STOCK CANNOT BE SOLD UNDER, WITHOUT DESCRIPTION.** — When the law gives to the creditor a process by garnishment through which he may reach the shares of stock in a corporation owned by his debtor, and get a sufficient description of them, and then have them sold under execution to satisfy his debt, he cannot be allowed to proceed by execution in the first place without any description. *Keating v. J. Stone etc. Live-stock Co.*, 670.
3. **OFFICER LEVYING EXECUTION ON SHARES OF STOCK MUST ASCERTAIN NUMBER OWNED BY DEBTOR.** — If an officer having an execution can ascertain the number of shares of stock in a corporation owned by the debtor, he may levy his execution upon so many of them as may be proper to satisfy it, but without such knowledge he cannot make a lawful levy or sale. A levy and sale of "all the shares of stock owned and belonging to" the execution debtor, and "all his right, title, and interest of, in, and to said shares of stock," no effort by garnishment having been made to ascertain the number of shares owned by the defendant, are void, and confer no title. *Keating v. J. Stone etc. Live-stock Co.*, 670.
4. **CORPORATIONS — EXECUTIONS AGAINST.** — The property of a public corporation, such as a railroad or bridge company, which is essential to the exercise of its corporate franchise and the discharge of the duties it has assumed towards the general public cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution or in pursuance of an order or decree of court. The only remedy of the judgment creditor in such case is to obtain the appointment of a receiver and a sequestration of the company's earnings. *Overton Bridge Co. v. Means*, 514.
5. **EXEMPTIONS — CONTRACTS TO WAIVE.** — A contract by which a creditor employs his insolvent debtor, who is the head of a family, at a monthly compensation, one half thereof to be paid in cash, and the other half to be credited upon such indebtedness, cannot be enforced by the creditor after two months' services, when the statute exempts such compensation from garnishment or execution. Such debtor is entitled to the whole compensation contracted for, and may recover the half thereof which has been credited to his indebtedness by his creditor under the contract. *Deering v. Ruffner*, 473.
6. **PROCEEDINGS SUPPLEMENTARY TO EXECUTION — STATUTE AUTHORIZING JUDGMENT CREDITOR TO SUE NOT UNCONSTITUTIONAL.** — Where jurisdiction is once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied, and proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action. Section 720 of the California Code of Civil Procedure, which provides that the judge may, by order, authorize a judgment creditor to institute and maintain an action against an alleged debtor of the judg-

ment debtor, is not therefore unconstitutional on the ground that the debtor has under it no notice of the supplementary proceedings after judgment affecting his rights of property, nor on the ground that his debtor may be compelled to pay the debt twice. *High v. Bank*, 121.

2. COMPLAINT IN ACTION AGAINST GARNISHEE IN SUPPLEMENTARY PROCEEDINGS, WHEN SUFFICIENT. — A complaint in an action by a judgment creditor against a garnishee, in proceedings supplementary to execution, in which it is alleged that the assignor of the plaintiff recovered a judgment in the superior court, which judgment was duly entered, etc., and that the order authorizing the suit was duly made, is sufficient as against a general demurrer. *High v. Bank*, 121.

See ATTACHMENT, 4; CORPORATIONS, 13, 15; CREDITOR'S SUIT, 3-7; JUDGMENTS, 26; PLEADING, 1.

EXECUTORS AND ADMINISTRATORS.

1. PURCHASE BY — AVOIDANCE BY HEIRS — LACHES. — Where an administrator becomes interested, by purchase, in the land of the estate, after his sale thereof, but before its confirmation, the sale may be set aside by the heirs within a reasonable time, without proof of actual fraud or injury. This right may be lost by acquiescence or laches. *Gibson v. Herriott*, 17.
2. LACHES OF ADULT HEIRS — PURCHASE BY ADMINISTRATOR. — Where an administratrix purchases all the lands of the estate, including her dower therein, as an entire transaction at her own sale, and then makes valuable improvements on the entire estate claimed by her by virtue of her dower and her purchase, the sale, though voidable, will not be set aside at the instance of adult heirs, after such unreasonable delay by them as to constitute laches. *Gibson v. Herriott*, 17.
3. FRAUDULENT PURCHASE BY ADMINISTRATOR, SETTING ASIDE — COMPENSATION. — Where an administratrix purchases the lands of the estate, including her dower therein, at her own sale, and the sale is set aside as to infant heirs for constructive fraud after the administratrix has made valuable improvements, she is entitled to compensation for the full value of her improvements, less rents, and to have the purchase-money and taxes paid by her refunded, with interest, as to all of the land except her dower, and as to that she is entitled to have the purchase-money only refunded. *Gibson v. Herriott*, 17.

See EQUITY, 4, 7; JUDGMENTS, 14.

EXEMPTIONS.

See EXECUTION, 5; HOMESTEAD, 1, 3; JUDGMENTS, 26; MUNICIPAL CORPORATIONS, 7, 8; TAXES, 4-6.

EXTORTION.

See NOTARIES PUBLIC.

FEEES.

See ATTORNEY AND CLIENT, 2; NOTARIES PUBLIC; WILLS, 2.

FINDINGS.

See APPEAL, 10; MARRIAGE AND DIVORCE, 3; TRIAL, 10, 11.

FORBEARANCE

See **CONTRACTS**, 2.

FORECLOSURE

See **CHATTEL MORTGAGES**, 6; **PROCESS**, 2; **JUDGMENTS**, 19; **SPECIFIC PERFORMANCE**, 4.

FORFEITURE

See **AGENCY**, 3; **ASSOCIATIONS**, 3; **INSURANCE**, 12.

FRANCHISES

See **CONSTITUTIONS**; **EXECUTION**, 4; **MUNICIPAL CORPORATIONS**, 12, 13; **STATUTES**, 1.

FRAUD.

1. **TRADE-MARK — PURCHASE OR, INDUCED BY FRAUDULENT REPRESENTATIONS.** — In an action to recover the purchase price of a whisky trade-mark, the fact that the seller, by the manufacture of a large lot of inferior whisky, impaired the value of the brand, and, fraudulently concealing this fact from the purchaser, misrepresented the brand to be of good repute, thus inducing the purchase, is a good defense, if properly averred. *Dani v. Head*, 369.
 2. **JUDGMENTS — PLEADING FRAUD.** — To AVOID A JUDGMENT on the ground that it was obtained by fraud, the facts constituting the fraud must be pleaded and proved. *Thomas v. Thomas*, 483.
- See **ACTIONS**, 3; **CONTRACTS**, 26; **CORPORATIONS**, 3; **DEBTOR AND CREDITOR**, 2; **DEEDS**, 3; **EQUITY**, 1, 2; **EXECUTORS AND ADMINISTRATORS**, 1, 3; **FRAUDULENT CONVEYANCES**; **INSURANCE**, 9; **JUDGMENTS**, 8, 10, 12; **JUDICIAL SALES**, 5; **JURISDICTION**, 5, 6; **MISTAKE**, 1; **NEGOTIABLE INSTRUMENTS**, 7, 8.

FRAUDULENT CONVEYANCES.

1. **CONVEYANCE INTENDED TO DELAY AND DEFRAUD CREDITORS**, and made without consideration, is valid between the parties and their personal representatives. *Gilbert v. Stockman*, 922.
2. **CHATTEL MORTGAGE** executed by a debtor upon his entire personal property of a value greatly in excess of the debt secured is fraudulent and void as to his other creditors. *Thompson v. Richardson Drug Co.*, 505.
3. **AN AGREEMENT FOR FUTURE SUPPORT**, while it is a valuable consideration, is not sufficient to sustain a conveyance, when to do so will operate to the prejudice of the grantor's existing creditors, though no actual fraud was intended by any of the parties to the transaction. *Harting v. Jockers*, 341.
4. **IF A PORTION OF THE CONSIDERATION** for a conveyance is an agreement that the grantee will support the grantor, such agreement will be treated as a fraud upon the creditors of the grantor, though the remaining portion of the consideration involved the expenditure of money on the part of the grantee. *Harting v. Jockers*, 341.
5. **HUSBAND AND WIFE — SEPARATE ESTATE.** — When a husband in good financial circumstances gives his wife notes in payment of his ante-marriage debt due her, and after collecting the money on the notes, trans-

fers corporate stock of equal value to her in lieu thereof, and after selling part of the stock, invests the proceeds in land for her, such land, as well as the remainder of the stock or its proceeds, is the property of the wife, and cannot be taken by the husband's subsequent creditors, in the absence of proof of an intent to defraud, although the husband has become insolvent, and has always managed such property as his own, and as not belonging to his wife. *Second Nat. Bank v. Merrill*, 877.

6. **THE MERE FACT OF INDEBTEDNESS** does not preclude a debtor from providing for his future support by making a transfer in consideration of an agreement to support him, if he retains property amply sufficient for the payment of all his debts, and a provision for such future support is such as a prudent and just man would make, having due regard to his financial condition and circumstances, and retaining ample property to meet, without hazard, every just obligation. *Harting v. Jockers*, 341.
7. **IF ONE WHO MAKES A TRANSFER IN CONSIDERATION OF AN AGREEMENT FOR HIS SUPPORT** has, at the time, property consisting of promissory notes of persons then solvent of an amount double that of his indebtedness, such transfer cannot be assailed by a creditor who made no effort to collect his debt until after the makers of such notes had become insolvent, and such insolvency had so reduced the remaining estate of the transferrer that he was unable to pay his debts. *Harting v. Jockers*, 341.
8. **GIFT FROM PARENT TO CHILD — DELIVERY — VALIDITY.** — A gift of a note by a father to his minor child, made by delivering the note to the child's mother as its trustee, marking it with its name, it being laid aside to be kept by the mother for the child, is valid, as against existing and subsequent creditors of the vendor, if made in consideration of natural love and affection, when the donor was free from pecuniary embarrassment, and the gift was but a small part of his estate, and only a reasonable provision for the child. *Second Nat. Bank v. Merrill*, 870.
9. **GIFT FROM PARENT TO CHILD — VALIDITY AS AGAINST CREDITORS.** — When a father in good financial circumstances makes a valid gift of a note to his minor son, and receiving payment of the note during the minority of the child, transfers stock to him in lieu of the note, and after the son has attained his majority and the stock has become worthless, the father conveys land of equal value with the original note to the son in lieu of such stock, the conveyance cannot be successfully attacked by a subsequent creditor of the father, in the absence of proof of an intent to defraud; nor will the delay of the son in recording such conveyance vitiate it, unless an intent to defraud creditors of the father is shown. *Second Nat. Bank v. Merrill*, 870.
10. **STATUTE OF FRAUDS — CHANGE OF POSSESSION NECESSARY ON SALE OF PERSONAL PROPERTY OWNED BY CO-TENANTS WHEN.** — When one of the co-tenants of personal property, who is in the exclusive possession thereof, sells his interest in it to a third person, there must be an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code of California, or the sale will be void as to the seller's creditors. *Brown v. O'Neal*, 111.
11. **TRANSFER OF PERSONAL PROPERTY WITHOUT CHANGE OF POSSESSION VOID AS TO CREDITORS WHO ARE SUCH WHILE SELLER REMAINS IN POSSESSION.** — A transfer of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void as against those who are the

creditors of the seller during any of the time that he remains in possession, and such creditors may cause the property to be seized as if no such transfer had been attempted by the debtor. *Brown v. O'Neal*, 111.

12. PRESUMPTION OF INTENT. — When an act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with fraudulent purpose and intent. *Harting v. Jockers*, 841.

See CREDITOR'S SUIT, 1; EXECUTION, 1; PLEADING, 2.

FRAUDULENT REPRESENTATIONS.

See COVENANTS, 3; ESTOPPEL, 1-3; FRAUD, 1; MISTAKE, 2.

GARNISHMENT.

See ATTACHMENT; EXECUTION, 2, 3, 5.

GIFTS.

See FRAUDULENT CONVEYANCES, 3, 3.

GRANTS.

See ESTATES, 1, 4.

GUARANTY.

GUARANTOR BOUND ONLY BY PRECISE TERMS OF CONTRACT GUARANTEED BY HIM. — A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed. *Staver v. Locke*, 621.

GUARDIAN AND WARD.

See ATTORNEY AND CLIENT, 2; HABEAS CORPUS, 3; JUDGMENTS, 16; PARENT AND CHILD.

HABEAS CORPUS.

1. PARENT AND CHILD. — The writ of *habeas corpus* is the proper remedy to ascertain and enforce the proper custody of an infant; and when so used, the writ is of an equitable nature. The welfare of the child is the controlling element by which the court is to be guided in the exercise of its discretion. *Green v. Campbell*, 843.
2. PARENT AND CHILD. — DISCRETION OF COURT. — When the writ of *habeas corpus* is invoked to obtain the custody of an infant, the court is in no case bound to deliver it into the custody of any claimant, but may leave it in such custody as the welfare of the child at the time appears to require. *Green v. Campbell*, 843.
3. PARENT AND CHILD — CUSTODY OF CHILD. — The court, in ascertaining and enforcing the proper custody of an infant, will not establish a permanent custody, but one intended to continue until a change of circumstances shall, in respect to the infant's welfare, require a change of custody, or until the infant has reached the age when he may legally nominate his own guardian. *Green v. Campbell*, 843.

HEAD OF FAMILY.

See HOMESTEAD.

HEARSAY.

See EVIDENCE, 2, 3.

HEIRS.

See CONTRACTS, 10; EQUIT, 7; EVIDENCE, 10, 11; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE, 1; JUDGMENTS, 14, 17, 23; LIMITATIONS OF ACTIONS, 7, 10.

HIGHWAYS.

1. **MUNICIPAL CORPORATIONS — STREETS — POWER OF LEGISLATURE OVER.** — Where an alley has been occupied and used as a highway by an owner of adjacent lots long enough for him to have acquired the right to use it without obstruction, the legislature has no power to pass an act closing it, in whole or in part, without the consent of or compensation to the abutting lot-owner, whether the alley has been formally dedicated to the public use or not. *Bannon v. Rohmeyer*, 355.

2. **EMINENT DOMAIN — RIGHTS OF ABUTTING STREET OWNERS SUBORDINATE TO STREET IMPROVEMENT.** — The original and all subsequent purchasers of property abutting on a street take with the implied understanding and agreement that the public shall have the right to improve or alter the street for street purposes, and that they can sustain no claim for damages resulting to their property from the impairment or destruction of their incidental rights of ingress and egress and of light and air, as a mere consequence from the use or improvement of the street as a highway. *Selden v. Jacksonville*, 278.

3. **STREETS AND HIGHWAYS. — AN ENCROACHMENT** is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights of possession of another. *Chase v. Oshkosh*, 898.

4. **STREETS AND HIGHWAYS. — AN OBSTRUCTION** is a BLOCKING UP; filling with obstacles or impediments; impeding, embarrassing, or opposing the passage along and over the street. And to constitute it such, it need not be such as to stop travel. *Chase v. Oshkosh*, 898.

See EMINENT DOMAIN, 3; MUNICIPAL CORPORATIONS, 25; NUISANCE, 1; TELEPHONE COMPANIES.

HOMESTEAD.

1. **WHO ENTITLED TO — HEAD OF FAMILY.** — To entitle a debtor to the benefit of a homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* housekeeper with a family, whether such debt was created before or after the homestead was acquired. *Bosquett v. Hall*, 404.

2. **HEAD OF FAMILY.** — A debtor is entitled to the benefit of a homestead exemption only when he is a housekeeper, and has residing with him some person whom he is under a natural or moral obligation to support, or who is dependent upon him for support. *Bosquett v. Hall*, 404.

3. **HEAD OF FAMILY — WHAT DOES NOT CONSTITUTE.** — When the persons residing with a debtor, though children, are strangers in blood to him, and he is under no legal or natural obligation to support them, he is not the head of a family so as to be entitled to a homestead exemption. *Bosquett v. Hall*, 404.

See TAXES, 1.

HOMICIDE.

1. **HOMICIDE BY OFFICER TO PREVENT ESCAPE OF MISDEMEANANT.** — Where one accused of misdemeanor has been arrested and is fleeing, a peace-officer is not justified in killing him to prevent his escape, although no other means of prevention are available. *Thomas v. Kinkead*, 68.
2. **MISDEMEANOR — ARREST OR ESCAPE — RIGHTS OF OFFICER.** — A peace-officer, in making an arrest for misdemeanor or preventing the escape of the misdemeanant, may exert such physical force as is necessary to effect his purpose, but he is not justified, in either case, in taking the life of the accused, nor can he inflict upon him great bodily harm, except to save his own life, or prevent a like harm to himself. *Thomas v. Kinkead*, 68.
3. **HOMICIDE BY OFFICER TO PREVENT ESCAPE OF FELON.** — A peace-officer is justified in killing a person arrested for felony who is fleeing to escape, if no other means of prevention are available. *Thomas v. Kinkead*, 68.
4. **THREATS AS EVIDENCE.** — To make threats of the deceased admissible in cases of homicide in connection with an overt act, the proof must show such a demonstration of an immediate intention to execute the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer serious bodily harm if he does not take the life of his adversary. It must be such an act as is reasonably calculated to induce the belief that the execution of the threatened attack has actually commenced, and the circumstances of the killing must be such as tend to raise or support a case of self-defense. *Garner v. State*, 231.
5. **EVIDENCE — THREATS, WHEN ADMISSIBLE.** — Threats are admissible in evidence in criminal cases when they are part of the *res gestæ* or when there is doubt as to who began the fatal difficulty, whether they were conveyed to the defendant or not. In all other cases, threats previously made by the deceased, whether communicated to the defendant or not, are not admissible, unless the evidence tends to show that the deceased, at the time of the killing, had in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration or overt act of attack toward the accomplishment or consummation of such threats. *Garner v. State*, 231.
6. **THREATS AS EVIDENCE — WEIGHT OF, QUESTION FOR JURY.** — When, in cases of homicide, the court has admitted threats uttered by the deceased in evidence, it is for the jury to determine, after considering all the evidence, whether or not the accused had even apparently reasonable grounds for believing that he was in imminent danger of life or of great bodily harm at the time the killing was done. *Garner v. State*, 231.
7. **THREATS AS EVIDENCE — QUESTION FOR COURT.** — In cases of homicide, the question of the admissibility of threats by the deceased is one for the court to decide, and if there is the slightest evidence tending to prove a hostile demonstration which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm, the threats should be admitted. They should also be admitted when any doubt exists in the mind of the court as to whether or not the alleged demonstration, considered in connection with such threats, would be sufficient to cause a man of ordinary prudence to reasonably believe himself to be in danger of his life or of great bodily harm. They should be excluded when there is no proof of any act tending to

cause such person to reasonably entertain such a fear. *Garner v. State*, 231.

8. **EVIDENCE OF BAD CHARACTER OF DECEASED — GENERAL REPUTATION.** — In cases of homicide, proof of the violent and dangerous character of the deceased can only be made by evidence of his general reputation in the community for such character, and not by evidence of specific acts or general bad conduct. *Garner v. State*, 231.
9. **EVIDENCE OF BAD CHARACTER OF DECEASED, WHEN ADMITTED.** — In cases of homicide, evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that the defendant acted in self-defense, or under such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or of suffering great bodily harm at the hands of the deceased; but it is not admissible for this purpose except when it explains or gives meaning, significance, or point to the conduct of the deceased at the time of the killing, and such conduct must be shown before the auxiliary evidence of such character can be introduced. To admit such evidence, there must be some act on the part of the deceased which, though considered independent of his dangerous character would be regarded as innocent or harmless, may arouse a reasonable belief of imminent peril to life or limb, when received and considered in connection with or illustrated by such character. *Garner v. State*, 231.
10. **EVIDENCE OF BAD CHARACTER OF DECEASED, WHEN NOT ADMISSIBLE.** — In cases of homicide, where there is no evidence tending to show that the killing was done in self-defense, or any conduct on the part of the deceased from which, assuming him to have been a violent and dangerous man, any inference can reasonably be drawn that he intended the immediate perpetration of an act imminently dangerous to the life of the accused, or of serious bodily harm to him, evidence of the violent and dangerous character of the deceased is not admissible. *Garner v. State*, 231.
11. **EVIDENCE OF BAD CHARACTER OF DECEASED — FUNCTIONS OF COURT AND JURY.** — The admissibility of evidence of the violent and dangerous character of the deceased in cases of homicide is for the court to determine, and its weight, when admitted, is for the jury, under all the evidence in the case. *Garner v. State*, 231.
12. **MURDER IN FIRST DEGREE — INTOXICATION AS DEFENSE.** — When a premeditated design to effect the death of the person killed is essential to the crime of murder in the first degree, voluntary intoxication may be considered by the jury as affecting the capacity of the accused at the time of the killing to form such design; and if the accused, at the time of the killing, was so much intoxicated as to be incapable of forming a premeditated design to take human life, he cannot be convicted of murder in the first degree. *Garner v. State*, 231.
13. **INTOXICATION AS DEFENSE.** — Voluntary intoxication, and the effect thereof, will not render that a sufficient provocation to reduce a killing to manslaughter which would not be so in the absence of such intoxication; and as between murder in any degree below the first and manslaughter, such intoxication plays no part, the only purpose for which it is admissible being to show an absence of a premeditated design, or that the killing was not murder in the first degree. The only effect of proof of intoxication, such as rendered the accused incapable of a premeditated

- design to kill, will be to reduce the killing to murder of the second or third degree, according to the circumstances. *Garner v. State*, 231.
14. **INTOXICATION AS A DEFENSE**. — Where one becomes voluntarily intoxicated for the purpose of carrying out a preconceived design to take human life, his intoxication at the time of the killing is no defense. *Garner v. State*, 231.
15. **INTOXICATION AS A DEFENSE — INSTRUCTIONS**. — To instruct the jury that the law presumes that a person who is sober enough to form an intention to shoot another, and actually does kill him without justification or excuse, is sober enough to form a premeditated design to kill the person shot, and that in such case the person shooting is criminally liable for his act, is erroneous; for while the law presumes a sober man to intend what he does, it does not presume a killing with a premeditated design. This, like every other element of the crime, must be proved. *Garner v. State*, 231.
16. **INSTRUCTIONS AS TO RECOMMENDATION TO MERCY**. — In cases of murder, the court, when charging the jury as to a verdict of guilty, with a recommendation to the mercy of the court, should give the terms of the statute, with the information that making or withholding the recommendation is a matter which is entirely within the discretion of a majority of the jury-men. *Garner v. State*, 231.
17. **INSTRUCTIONS UPON SELF-DEFENSE** in murder cases should give the accused the benefit of a reasonable fear of death or of great bodily harm from the deceased. *Garner v. State*, 231.

See ASSAULT, 2, 3; CRIMINAL LAW, 3.

HUSBAND AND WIFE

1. **CONVEYANCE TO HUSBAND AND WIFE**. — When a husband conveys to his wife's brother, who immediately executes a conveyance purporting to convey the same realty to the wife, upon condition that she shall survive her present husband, and in such case only, to her heirs and assigns forever, and also purporting to convey the same property to the husband, his heirs and assigns, upon the condition that he survive his wife, and stating that it is expressly understood that the property is to be vested in the wife and her heirs in case she outlive her husband, but in case she did not outlive him, then to be vested in such husband's heirs and assigns, such conveyance vests in the husband and wife the use of the property during their joint lives, and the contingent remainder to the survivor. *Bartholomew v. Mummy*, 206.
2. **HUSBAND MAY CONVEY REAL PROPERTY TO HIS WIFE** through the medium of a third person. *Bartholomew v. Mummy*, 206.
3. **MANAGEMENT OF WIFE'S SEPARATE ESTATE BY HUSBAND**. — The fact that a husband has the management of his wife's separate personal property as if it belonged to him, and not to the wife, will not affect her title to it, so far as the creditors of the husband are concerned. *Second Nat. Bank v. Merrill*, 877.
4. **MARRIED WOMAN, LACHES OF**. — Laches is imputable to a married woman in respect to her separate property. *Gibson v. Herriott*, 17.
- See DAMAGES, 4, 6; DEBTOR AND CREDITOR; EVIDENCE, 2, 3; FRAUDULENT CONVEYANCES, 5; LIMITATIONS OF ACTIONS, 9; MARRIAGE AND DIVORCE; TRUSTS, 6; WITNESSES.

IDIOTS.

See INSANE PERSONS.

IMPEACHMENT.

See NEGOTIABLE INSTRUMENTS, 2.

IMPRISONMENT.

See DURESS; RAILROADS, 12.

INDIOTMENT.

See TRIAL, 6, 7.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 2.

INFANTS.

See CRIMINAL LAW, 1; HABEAS CORPUS; JUDGMENTS, 16; LIMITATIONS OF ACTIONS, 10; MASTER AND SERVANT, 3; NEGLIGENCE, 4, 5; PARENT AND CHILD; SPECIFIC PERFORMANCE, 5.

INJUNCTION.

1. INJUNCTION TO RESTRAIN TRESPASS. — While an injunction will not be granted to restrain a trespass, merely because it is such, yet equity will interfere by injunction where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits, or where the trespasser is insolvent, and on that account unable to atone for it. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
2. INJUNCTION TO RESTRAIN TRESPASS — SUFFICIENCY OF BILL. — A bill, to justify an injunction in case of trespass, in addition to an allegation that complainant has no adequate remedy at law, and that his damage will be irreparable, must also allege such facts as will enable the court to determine whether or not his alleged injury will be irreparable. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
3. INJUNCTION AGAINST BRINGING ACTIONS ON CLAIMS ASSIGNED to him will not issue against one to whom numerous holders of policies of life insurance, issued on the reserve dividend plan, have assigned their respective rights to recover the residue claimed to be due on their policies, they having, in reliance on the statements of the insurer, accepted sums less than those actually due them, and given receipts in full. *Metropolitan etc. Ins. Co. v. Fulier*, 196.
4. INJUNCTION TO AID MONOPOLY. — A corporation engaged in carrying freight and passengers on a navigable river by means of steamboats cannot create a monopoly by obtaining a lease from a railroad company of its dock on said river, on which its track and terminal facilities are located. Nor is it entitled to an injunction restraining and excluding all others from landing at such dock for the purpose of delivering or receiving freight to and from such railroad company. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
5. INJUNCTION WILL NOT ISSUE IN ONE STATE TO ENJOIN THE PROSECUTION OF SUITS IN ANOTHER against parties there resident, when there

is nothing to show that such prosecution would not be lawful and successful, or that it would cause any unusual expense or inconvenience to the parties sued. *Metropolitan etc. Ins. Co. v. Fuller*, 196.

6. **REMEDY FOR UNLAWFUL ISSUE OF.** — A TENANT who has been enjoined without cause by the landlord from enjoying the leased premises may, upon the dissolution of the injunction, recover damages in an action on the case for the injury, in addition to his remedy on the injunction bond. *Hubble v. Cole*, 716.
7. **REMEDY FOR UNLAWFUL ISSUE OF.** — A defendant in an injunction suit has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy on the injunction bond. *Hubble v. Cole*, 716.
8. **DISSOLUTION OF, ON MOTION AFTER EXCEPTIONS TO ANSWER.** — The mere filing of exceptions to portions of an answer, not in response to a bill for an injunction, is, of itself, no objection to the dissolution of the injunction on motion, when the portion of the answer not excepted to sufficiently denies the grounds of equity upon which the injunction was granted. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
9. **MOTION TO DISSOLVE INJUNCTION ON BILL AND ANSWER INVOLVES** the sufficiency of the equities of the bill to justify the writ in the first instance. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
10. **DISSOLUTION OF, ON MOTION, AND DISMISSAL OF BILL.** — Where a bill in equity prays for other relief besides an injunction, it is error, when dissolving the temporary injunction on motion, to also dismiss the bill, when it states a case which would, if proved on the final hearing, entitle the complainant to the other relief prayed for. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
11. **MOTION TO DISSOLVE — NEW MATTER IN ANSWER NOT CONSIDERED.** — When the equity of a bill for injunction is admitted by answer, or not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not a denial of complainant's equity, and the injunction will not be dissolved on motion, but will be continued until a hearing of the cause. On such motion, the court will look only to such facts of the answer as are responsive to the bill, and the new equity set up in the answer to avoid that disclosed in the bill will not be considered. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
12. **DISSOLUTION OF — DISCRETION OF COURT.** — While an injunction will ordinarily be dissolved on motion upon an answer denying all the equities of the bill, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, it does not follow as a matter of course to do so in all cases, because the dissolution or continuance of an injunction on motion to dissolve rests in the sound discretion of the court, to be governed by the nature of the case. *Indian River S. S. Co. v. East Coast Transp. Co.*, 258.
13. **DISSOLUTION OR CONTINUANCE OF, ON MOTION — DISCRETION OF COURT.** — In determining the propriety of dissolving or continuing an injunction on motion, the court may not only anticipate the character of the injury that may result to the complainant in the event that he should finally succeed, but it can also consider the extent and character of the damage which defendant may sustain by means of the continuance of the injunction, and the action of the court will not be disturbed unless a sound

discretion has been abused. *Indian River S. S. Co. v. East Coast Transp. Co.*, 253.

See EQUITY, 1, 2.

IN PARI DELICTO.

See CRIMINAL LAW, 1.

INSANE PERSONS.

1. **SUICIDE AS EVIDENCE OF INSANITY.** — Suicide may be considered, in connection with other evidence, to establish insanity, but it does not, of itself, establish that fact or want of capacity to make a contract, nor does it establish a presumption of insanity. *Jones v. Gorham*, 423.
2. **SUICIDE AS EVIDENCE OF INSANITY.** — Proof of several attempts to commit suicide made by a grantor in a deed shortly before its execution, followed by his suicide shortly after its execution, is not sufficient to establish his insanity or want of capacity to make a contract at the time of the execution of the deed. *Jones v. Gorham*, 423.

See ATTORNEY AND CLIENT, 2; CRIMINAL LAW, 3.

INSOLVENCY.

1. **SECURED CREDITOR'S ENTIRE CLAIM PROVABLE AGAINST INSOLVENT'S ESTATE.** — A creditor whose claim is secured by mortgage may prove the entire claim against the estate of an insolvent debtor, and is entitled to a dividend on the face of such claim, without regard to the value of the mortgaged property. *Kellogg v. Miller*, 618.
2. **JUDGMENTS AS PREFERENCES.** — Under the Assignment Act of Illinois, a judgment is not invalid as a preference when the only act which the insolvent did towards its procurement was to answer correctly questions put to him regarding his financial status. A creditor may, notwithstanding the statute, take steps to secure his debt as best he can, except that he must not be guilty of collusion with his debtor by which an unauthorized preference is sought to be made. *Pheme etc. Mfg. Co. v. Caldwell*, 305.

See CORPORATIONS, 14; CREDITOR'S SUIT, 7; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES, 5, 7; INJUNCTION, 1; LANDLORD AND TENANT, 3.

INSTRUCTIONS.

See APPEAL, 3; DAMAGES, 5; HOMICIDE, 15, 17; TRIAL, 8, 9.

INSURANCE.

1. **ENTIRETY OF.** — When an insurance policy covers a dwelling and various classes of personal property, describing them separately, and specifies different and separate amounts on the dwelling and each kind of personalty, the execution of a mortgage on the real estate, in violation of a condition against subsequent encumbrances on any of the property insured, is no defense to an action for the loss of the personalty not encumbered. *German Ins. Co. v. Fairbank*, 459.
2. **INSURANCE OF PERSONALTY — WHEN SEPARABLE.** — When an insurance policy describes different classes of personal property insured for separate and distinct amounts, a violation of a condition in the policy against subsequent encumbrances, by the execution of a chattel mortgage on

one class of the property, will not prevent a recovery for the loss of the other and unencumbered class. *German Ins. Co. v. Fairbank*, 459.

3. **ENTIRETY OF.** — If a policy includes real property, and also personal property in the buildings thereon, the risk being distributed, — that is to say, certain sums on the buildings and certain other sums on the personal property therein, — a misrepresentation in respect to the buildings, and which avoids the insurance thereon, also avoids it as to the personal property. The contract of insurance in such case is entire, and there can be no recovery on personal property if there has been a material misrepresentation as to the buildings. *Stevens v. Queen Ins. Co.*, 905.
4. **CONDITION IN A POLICY OF INSURANCE AGAINST THE SALE OR TRANSFER** of the property insured is not broken by the sale of part of the interest of the assured therein, as where he takes a partner, and the property insured becomes vested in the partnership. After such sale the partner insured may maintain an action on the policy in his own name, but can recover only to the extent he has been damaged. *Blackwell v. Ins. Co.*, 574.
5. **A REPRESENTATION CONCERNING ENCUMBRANCES**, contained in an application for insurance on property, is regarded as a warranty, and if substantially untrue, avoids the policy. *Stevens v. Queen Ins. Co.*, 905.
6. **NOTICE TO AGENT OF ENCUMBRANCES.** — The fact that an agent of an insurance company, some months after the insurance was effected, negotiated a loan secured by a mortgage on the property insured, and witnessed the mortgage, and as notary public took the acknowledgment of it, does not constitute a waiver of the condition in the policy providing that it shall become void if there should be any mortgage on the property insured without the insurer giving notice to the company and obtaining consent therefor, when the policy also declares that no agent at the place of issue is authorized to alter its conditions, and it appears that the agent, at the time he negotiated the loan and witnessed the mortgage, did not have in his mind the fact that the property had been insured, and there is nothing to indicate that the company ever had notice of the mortgage until after the loss of the property by fire had occurred. *Stevens v. Queen Ins. Co.*, 905.
7. **VACANT AND UNOCCUPIED PREMISES.** — If a policy of insurance declares that it shall be void if the building, if intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days, and the building is vacant when it is issued, it is valid, and so continues for the period of ten days, after which, if the building remains vacant and unoccupied, the policy ceases to be in force, and no recovery can be had thereon for the destruction of the property by fire after the period of ten days has elapsed, and while it remains vacant and unoccupied, the insurer never having consented to its continuing vacancy. *England v. Westchester etc. Ins. Co.*, 917.
8. **VACANCY OF PREMISES.** — When a policy of fire insurance covering sixteen tenement-houses, with a separate valuation on each, provides that if the premises become unoccupied, and so remain for twenty days, without the consent of the insurer, the policy shall be void, no recovery can be had, in case of total loss, for such of the houses as have remained vacant beyond the prescribed time without the consent of the insurer after the insurance attached; nor is the condition in the policy waived

by the insurer because of its issuance at a time when the entire premises were unoccupied. *Connecticut etc. Ins. Co. v. Tilley*, 770.

9. **THE FACT THAT A PREVIOUS POLICY ON THE SAME PROPERTY DID NOT CONTAIN ANY CONDITION** against the property being vacant and unoccupied does not prevent such condition from being operative, when there is no pretense of fraud or mistake, and the assured had ample opportunity to examine his policy and learn its contents. *England v. Westchester etc. Ins. Co.*, 917.

10. **WAIVER OF CONDITION AGAINST A BUILDING CONTINUING VACANT** for ten days will not be presumed from the mere fact that it was vacant when the insurance was effected, when nothing whatever occurred or took place between the parties upon this subject at the time, or thereafter, before the loss. *England v. Westchester etc. Ins. Co.*, 917.

11. **WAIVER OF PROOF OF LOSS.** — A denial of all liability by the insurer, on the ground that the policy was not in force at the time of the loss, by reason of the failure of the insured to pay his premium as provided for therein, dispenses with the necessity of furnishing preliminary proofs of loss. *Phoenix Ins. Co. v. Bachelder*, 443.

12. **PLEADING — WAIVER OF CONDITION.** — A waiver of the conditions of a fire insurance policy in regard to the payment of the premium note thereon, to be available against the insurer, must be pleaded. *Phoenix Ins. Co. v. Bachelder*, 443.

13. **FORFEITURE FOR NON-PAYMENT OF PREMIUM.** — When a policy of fire insurance provides that a failure to pay the premium note thereon at maturity suspends the policy until payment is made, but that it may be revived for the balance of the term by making full payment at any time before loss, the insurer is not liable for a loss occurring after the maturity of the premium, and after it has been partly, but not fully, paid. *Phoenix Ins. Co. v. Bachelder*, 443.

14. **PROOF OF LOSS.** — If an insurance policy requires that proof of loss must be made within thirty days thereafter, the insured must prove that such stipulation has been complied with, or that it has been waived by the company. *German Ins. Co. v. Fairbank*, 459.

15. **ACTION — LIMITATION.** — When an insurance policy requires notice and proof of loss to be furnished within thirty days and action to be commenced within six months after the loss, and provides that the insurer will pay the loss within ninety days after notice and proofs of loss have been received at the company's home office, the statute of limitations begins to run against the cause of action only from the expiration of the ninety days, and the suit may be commenced at any time within six months therefrom. *German Ins. Co. v. Fairbank*, 459.

See **ASSIGNMENT; CHAMPERTY; DEBTOR AND CREDITOR; INJUNCTION**, 3;
MUNICIPAL CORPORATIONS, 2-4.

INTEREST.

CONFLICT OF LAWS. — When a contract is made in one state, to be performed in another, and the legal rate of interest is higher in one state than in the other, the parties may in good faith stipulate for the higher rate of interest, without incurring the penalties of usury in either state. *Ooad v. Home Cattle Co.*, 465.

See **CHATTEL MORTGAGES**, 6; **DAMAGES**, 10; **NEGOTIABLE INSTRUMENTS**, 8.

INTERSTATE COMMERCE.

1. **ANY ATTEMPT BY A STATE** to regulate foreign or interstate commerce is void as an attempted exercise of a power which has been surrendered by the states to the national government. *Norfolk etc. R. R. Co. v. Commonwealth*, 705.
2. **WHEN BEGINS.** — Intoxicating liquor manufactured in one state does not become an article of interstate commerce until received by a carrier for shipment, and until then it is under the jurisdiction and control of the state wherein it was manufactured. *Tredway v. Hiley*, 447.
3. **INTERSTATE SUNDAY TRAINS.** — A state statute forbidding the running of interstate freight trains on Sunday between sunrise and sunset is void as a regulation of and obstruction to interstate commerce, no matter what its professed object may be. *Norfolk etc. R. R. Co. v. Commonwealth*, 705.

See STATUTES, 3.

INTOXICATING LIQUORS.

See CONTRACTS, 12, 13; INTERSTATE COMMERCE, 2; SPECIFIC PERFORMANCE 2; STATUTES, 2; TRUSTS, 4.

INTOXICATION.

See CRIMINAL LAW, 2, 3; HOMICIDE, 12-15.

JOINT LIABILITY.

See CORPORATIONS, 4.

JUDGMENTS.

1. **JUDGMENT IN FAVOR OF DECEASED PLAINTIFF.** — A judgment in favor of a plaintiff who is dead at the time of the institution of the action, such death not appearing on the record, creates a valid lien, and is not void, but merely voidable on appeal, and is impervious to collateral attack. *Watt v. Brookover*, 811.
2. **JUDGMENTS FOR OR AGAINST DECEASED PERSONS**, whether the fact of death appears on the record or not, are not void, but voidable only. *Watt v. Brookover*, 811.
3. **JUDGMENT NOT VOID BECAUSE IT OMITTS TO DISPOSE OF RIGHTS OF ALL PARTIES TO SUIT.** — The omission in a final judgment rendered in a suit for partition to name one of the parties shown by the pleadings to have an interest in the land does not render the judgment void, and parties not injured by such omission cannot take advantage thereof. It may also be presumed, in support of the judgment, that some reason was shown in the proceedings for the omission. *Alston v. Emmerson*, 639.
4. **PRIVITY — GRANTOR AND GRANTEE.** — A grantee of land is not affected by a judgment against his grantor after the conveyance merely because of privity in estate. *Bensimer v. Fell*, 774.
5. **LIEN OF — TRUST DEED — PARTIES.** — A judgment adjudging creditors liens on land of a debtor will not bar a holder of a debt by deed of trust, who does not prove his debt, from sharing in the proceeds of the sale under the decree, unless the trustee and *cestui que trust* are made formal parties thereto. *Bensimer v. Fell*, 774.
6. **LIEN OF PARTIES.** — A creditor holding a debt against a judgment debtor constituting a lien on his land, who is not made a formal party to a

judgment adjudging creditors' liens on the land of the debtor, and who does not prove his lien in such proceeding, is thereby barred from sharing in the proceeds of the sale under the decree, except in the surplus remaining after the satisfaction of the liens decreed. The debt, as a personal debt against the debtor, is not barred by such proceeding. *Bensimer v. Fell*, 774.

7. **LIEN OF — WHO BOUND BY.** — A judgment adjudging creditors' liens on the land of a debtor is conclusive as between the lien-holders proving liens, although not formal parties, as to the amount and existence of their debts for the purposes of the liens, and a personal judgment against the debtor for such liens is conclusive, not only between the creditor and debtor, but also between the lien-holders, as to the existence and amount of their respective debts. *Bensimer v. Fell*, 774.
8. **CONCLUSIVENESS OF.** — A judgment for a debt is conclusive, not only between the parties, but also as to strangers, to establish the amount and existence of the debt, and strangers can attack it only for fraud or collusion. *Bensimer v. Fell*, 774.
9. **JUDGMENT AGAINST CORPORATION CONCLUSIVE IN ACTION ON UNPAID SUBSCRIPTION TO CAPITAL STOCK.** — A judgment against a corporation establishes its liability conclusively, until reversed in a direct proceeding, and concludes the stockholders in an action brought to compel them to pay in the unpaid portion of their subscriptions to the capital stock toward the satisfaction of such judgment; and the complaint in such action need not allege the indebtedness upon which the judgment was rendered. *Tatum v. Rosenthal*, 97.
10. **CORPORATION — CONCLUSIVENESS OF JUDGMENT AGAINST — ULTRA VIRES.** — A judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of its creditors to subject its property to the satisfaction thereof, and, in the absence of fraud, equally conclusive upon the stockholders, when it is sought to satisfy the judgment out of the assets of the corporation in their hands; and therefore evidence offered by the stockholders, in the action against them, to show that the indebtedness for which the judgment against the corporation was recovered arose upon a contract which was *ultra vires*, is properly excluded by the trial court. *Baines v. Babcock*, 158.
11. **LIEN OF — CONCLUSIVENESS.** — A judgment adjudging creditors' liens on the land of a debtor will not bar a lien thereon created by a former owner of the land because of a failure to prove the lien, unless its owner is made a formal party to the proceeding. *Bensimer v. Fell*, 774.
12. **CONCLUSIVENESS OF — DEBTOR AND CREDITOR.** — A judgment for a debt is, as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor and the justness and amount of the debt, and cannot be attacked except for fraud or collusion. *Bensimer v. Fell*, 774.
13. **TAX DECREE — CONCLUSIVENESS.** — A decree, by a court having jurisdiction, enforcing a lien for unpaid taxes is conclusive of all matters which might have been litigated in the tax suit, and cannot be collaterally attacked by showing that illegal taxes have been assessed against the land, and that it was assessed for taxation when it was not liable for taxes. *Burcham v. Terry*, 42.
14. **PURCHASE OF LAND SUBJECT TO LIEN OF — RES JUDICATA — USURY.** — When, after the purchase of land subject to a judgment lien, another creditor brings suit to convene and enforce liens against the lands of the

judgment debtor, but not against the land so purchased, and without making the administrator or heirs of the purchaser formal parties, and a personal decree is rendered in such suit against the original debtor, based on the original judgment for the amount thereof increased by usury under an agreement between such debtor and his judgment creditor subsequent to the rendition of the judgment, and that the lands of the debtor be sold to pay that and the other liens convened, the administrator and heirs of the purchaser, in proceedings under an amended bill to subject the lands purchased to payment of the first judgment debt as fixed by the personal decree, are not estopped from showing the usury and disputing the amount of the debt as fixed by such decree, although they prove claim in the convention of creditors. *Bensimer v. Fell*, 774.

16. **RES ADJUDICATA — FORMER ADJUDICATION BAR TO ACTION, WHEN. —** When an issue is raised by a plea in reconvention, but is not for some reason submitted to the jury with other special issues in the case, the exclusion thereof from the consideration of the jury is an adjudication of it as conclusive on the parties as if it had been decided by the jury and expressed in their verdict or the judgment; and if the same issue be raised in a subsequent suit between the same parties, such former adjudication will be a bar to the action. The fact that the exclusion was erroneous does not make it the less binding or effective as an adjudication. The only remedy in that case was by motion for a new trial, appeal, or other proper means. *Flippen v. Dixon*, 653.
17. **JUDGMENT WITHOUT SERVICE ON MINOR DEFENDANTS REPRESENTED BY GUARDIAN AD LITEM NOT VOID. —** A judgment rendered without actual service of process on minor defendants who were represented by a guardian *ad litem* appointed by the court is not void, and cannot be attacked collaterally. *Alston v. Emerson*, 639.
18. **WANT OF JURISDICTION — DEFECTIVE AFFIDAVIT FOR ORDER OF PUBLICATION. —** A judgment or decree authorizing the sale of a decedent's lands to pay his debts is erroneous, where it appears upon its face that the affidavit on which rested the order of publication against his heirs as non-residents was defective and insufficient. *Hull v. Hull*, 800.
19. **JUDGMENTS ON INSUFFICIENT COMPLAINTS — COLLATERAL ATTACK. —** The sufficiency of the petition, in an action to foreclose a mortgage, is not a test of jurisdiction, and if the court has jurisdiction, an error committed by it in holding the petition to be sufficient will not render its judgment subject to collateral attack. *Taylor v. Coots*, 426.
20. **FORECLOSURE — COLLATERAL ATTACK. —** When, in an action to foreclose a mortgage against a non-resident defendant, the court acquires jurisdiction over him through service by publication, its decree of foreclosure and the sale thereunder are not subject to collateral attack for any errors committed by the court in the course of the proceedings. *Taylor v. Coots*, 426.
21. **JUDICIAL SALES — DEFECTIVE DECREE. —** A judgment or decree authorizing the sale of a decedent's lands to pay his debts, but not declaring upon its face what particular debts are to be paid, or fixing their order or priority, is erroneous, and will not support a sale made thereunder. *Hull v. Hull*, 800.
22. **JUDGMENTS BEYOND ISSUE — VALIDITY OF — ASSIGNMENT OF DOWER. —** When commissioners are appointed to assign dower out of land described in the widow's petition for their appointment, and they assign her dower

out of land not included nor described therein, in addition to the land described, the judgment of the probate court confirming their action is void, as including matter not within nor presented by the issue. *Falls v. Wright*, 74.

22. JUDGMENTS BEYOND ISSUE — ASSIGNMENT OF DOWER — LIMITATION AGAINST HEIR. — When a judgment confirming an assignment of dower is void because including matter not presented by the issue, the widow obtains no life estate in the land, and the statute of limitations begins to run against the heir to the estate from the time of his majority, and not from the time of the widow's death. *Falls v. Wright*, 74.

23. LIEN NOT ENLARGED BY SUBSEQUENT USURIOUS AGREEMENT. — A purchaser of land subject to a judgment lien takes it subject only to the amount of the judgment, and not subject to that amount increased by usury under a subsequent agreement between the judgment debtor and the creditor. *Bensimer v. Fell*, 774.

24. PURCHASE OF LAND SUBJECT TO LIEN OF — WHEN NOT AFFECTED BY SUBSEQUENT PROCEEDINGS. — One who purchases land subject to a judgment lien is not affected by a subsequent judgment against the same land for an amount in excess of such lien to which he was not a formal party and in which the true amount of the first judgment lien was not litigated, and he may satisfy such lien by the payment of the amount called for by the judgment under which he purchased. *Bensimer v. Fell*, 774.

25. JUDGMENT IS NOT A LIEN UPON LANDS WHICH THE JUDGMENT DEBTOR BEFORE ITS ENTRY HAD CONVEYED without consideration and for the purpose of defrauding his creditors, under a statute declaring that a judgment is a lien upon all lands not exempt from execution which the debtor may have at the time of the docketing thereof, or which he shall have acquired at any time thereafter within the period of ten years. *Gilbert v. Stockman*, 922.

26. JUDGMENT AGAINST FOREIGN CORPORATION ENFORCEABLE ONLY AGAINST PROPERTY ATTACHED WHEN. — Where a foreign corporation has no managing agent or other officer in a state upon whom service of summons can be made, the only valid judgment that can be rendered against it in an action of *assumpsit* is one in the nature of a judgment *in rem* against such property as was seized under a writ of attachment therein. The fact that a judgment rendered in such action is a general one for the recovery of money only, and makes no reference to the fact that any property has been attached therein, does not render it void, if in fact such attachment was made; but if no property was attached in the action, the court is without jurisdiction to render any judgment that can be enforced against the property of the defendant. *Blanc v. Paymaster Mining Co.*, 149.

See ACTIONS, 1; APPEAL, 4, 9, 11; ATTACHMENT, 2, 3, 5; ATTORNEY AND CLIENT, 1; CORPORATIONS, 1, 4, 13, 15; CREDITOR'S SUIT, 1, 4, 7; EQUITY, 1, 2; EVIDENCE, 10, 11; EXECUTION, 4, 6, 7; FRAUD, 2; INSOLVENCY, 2; JUDICIAL SALES, 3; JURISDICTION, 3; LIMITATIONS OF ACTIONS, 6, 7; MUNICIPAL CORPORATIONS, 9; PLEADING, 1, 4; TRIAL, 3, 5, 10, 11.

JUDGES.

See LEGISLATURE, 2.

JUDICIAL NOTICE.

See EVIDENCE, 1.

JUDICIAL OPINIONS.

See MANDAMUS.

JUDICIAL SALES.

1. **RIGHTS OF PURCHASER — DOWER.** — A purchaser of an estate at a void judicial sale, who, upon its disaffirmance, is entitled to subrogation to the rights of a creditor whose debt his money has paid, cannot charge the dower right of the widow with one third of the rents and profits of the estate purchased, when no dower therein has been actually assigned. *Hull v. Hull*, 800.
2. **RIGHT OF PURCHASER TO SUBROGATION.** — A purchaser of land sold under a void decree is entitled, upon the disaffirmance of the sale, to be subrogated to the rights of the creditor whose valid debt his money has gone to pay, and to charge the land by creditors' bill with the amount of such debt. *Hull v. Hull*, 800.
3. **SHERIFF'S SALE, PLAINTIFF PURCHASING AT, NEED NOT PAY THE AMOUNT OF HIS BID.** — When a sheriff, who is holding personal property by virtue of a writ in favor of the purchaser, sells it under such writ, the amount of the bid being less than the amount of the judgment upon which the writ issued, the purchaser is entitled to the possession of the property upon paying the costs and receipting for the balance of his bid, although the property in the sheriff's hands may be liable to seizure and sale to satisfy the debt of a person having a superior lien thereon. *Brooks v. Lewis*, 650.
4. **SHERIFF'S SALE OF ENCUMBERED PROPERTY, WHAT PASSES BY.** — When a sheriff sells encumbered property, the purchaser acquires the equity of redemption only, — that is, the right to pay the prior lien and hold the property. *Brooks v. Lewis*, 650.
5. **EFFECT OF CONFIRMING.** — An order confirming a sale of real estate, by a court having jurisdiction of the parties and subject-matter, cures all defects in the appraisement and sale, in the absence of fraud, and is conclusive upon the parties and their privies until reversed. *Watson v. Tromble*, 492.

See JUDGMENTS, 19-21.

JURISDICTION.

1. **JURISDICTION.** — If TWO OR MORE COURTS HAVE CONCURRENT JURISDICTION over the same subject-matter, the court first acquiring jurisdiction by the service of process will retain it, to the exclusion of the other. *Plume etc. Mfg. Co. v. Caldwell*, 305.
2. **JURISDICTION TRANSFERRED BY CONSENT.** — Though a court has acquired jurisdiction over property by its seizure under its process, yet the parties interested may stipulate that the property shall be surrendered to another court, and after such surrender the latter acquires jurisdiction, which it may exercise to the same extent as if it had been the first to obtain jurisdiction. *Plume etc. Mfg. Co. v. Caldwell*, 305.
3. **JURISDICTION TO RENDER PERSONAL JUDGMENT** cannot be obtained against a defendant who does not reside and is not within the state, and upon whom process is not served except by the publication thereof. *Reiter v. Hurlburt*, 850.
4. **JUDGMENTS AGAINST NON-RESIDENTS BY PUBLICATION.** — A state possesses the power to provide for the adjudication of land titles within its

Himits, as against non-residents who are brought into court only by publication, even though a court of equity where the defendant is found might be competent to force him to execute a release of his claim of title. *McLaughlin v. McCrory*, 56.

6. **EQUITY — JURISDICTION IN REM — CONSTRUCTIVE SERVICE.** — A suit in equity to cancel a deed for fraud is, under the Arkansas statute, a proceeding *in rem*, and may be prosecuted against a non-resident by publication of summons. *McLaughlin v. McCrory*, 56.

6. **EQUITY — JURISDICTION IN REM.** — Courts of equity may be empowered by statute to annul deeds for fraud, and to establish titles to lands within their jurisdiction by mere force of their decrees, and to that extent their action is *in rem*. *McLaughlin v. McCrory*, 56.

7. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.** — IF, AFTER PROPERTY HAS BEEN ATTACHED by valid process against its owner, he makes an assignment for the benefit of his creditors, the court under whose writ the attachment was effected acquires jurisdiction over such property, and no other court can divest it of such jurisdiction or authorize the property to be taken from its officer; but if the plaintiffs in the attachment stipulate that the assignee for the benefit of creditors shall take possession of the property, and that it shall pass to him, subject to their liens, the property passes from the jurisdiction of the court under whose writ it was attached to the court having jurisdiction over the assignment for the benefit of creditors, and the latter, therefore, is the only court having power to ascertain and declare the rights and liens of the respective parties in such property. *Plume etc. Mfg. Co. v. Caldwell*, 305.

See INTERSTATE COMMERCE, 2; JUDGMENTS, 13, 17, 18; JUDICIAL SALES, 5; LIMITATIONS OF ACTIONS, 6.

JURY AND JURORS.

See EVIDENCE, 7; HOMICIDE, 6, 11, 12, 16; JUDGMENTS, 15; NEGLIGENCE, 8; TRIAL.

JUSTICE OF THE PEACE.

See ACKNOWLEDGMENT, 1.

LACHES.

See EQUITY, 5-7; EXECUTORS AND ADMINISTRATORS, 1, 2; HUSBAND AND WIFE, 4; LIMITATIONS OF ACTIONS, 10.

LANDLORD AND TENANT.

1. **LANDLORD NOT BOUND TO RELET PREMISES WRONGFULLY ABANDONED BY TENANT.** — When a tenant wrongfully abandons the demised premises, the landlord may re-enter for the purpose of caring for them, without waiving his rights under the lease. He is not bound to relet the premises, but if he does relet them, the measure of his damages for the breach of the old lease will be the difference between the rent under it and the rent he receives under the new lease. *Bowen v. Clarke*, 625.

2. **A TAKING OF A PART OF LEASED PROPERTY**, in the exercise of the right of eminent domain, does not release the tenant's liability to pay rent for the entire estate according to the terms of the lease. *Stubbings v. Evanson*, 300.

3. **IF A TENANT, IN PROCEEDINGS IN THE EXERCISE OF THE POWER OF EMINENT DOMAIN,** is awarded the full value of his leasehold interest to the end of his lease, and the payment of the award to the tenant may leave the landlord, on account of the insolvency of the tenant, without remedy to collect the rent which will accrue upon the lease, a court of equity may interpose and appropriate so much of the award as may be necessary to satisfy the demands of the landlord. *Stubbings v. Brunton*, 300.
4. **EMINENT DOMAIN. — A TENANT OF REAL PROPERTY** holds his term subject to the right of the public to take a part or the whole of it for public use at such time as the public necessity may require, upon payment of just compensation; and in estimating such compensation the tenant must be regarded as having an estate in the property, measured by his original lease, and for which he remains liable to pay rent as in such lease stipulated. *Stubbings v. Brunton*, 300.
See ADVERSE POSSESSION, 2, 3, 5; INJUNCTION, 6; NEW TRIAL, 1.

LATERAL SUPPORT.

See EMINENT DOMAIN, 8; MUNICIPAL CORPORATIONS, 21; REAL PROPERTY

LAW OF CASE.

See APPEAL, 1, 2.

LEASE.

See CONTRACTS, 6; COVENANTS, 3; INJUNCTION, 4; LANDLORD AND TENANT; MISTAKE, 2.

LEGISLATURE.

1. **TAXATION — POWER OF STATE TO GRANT RIGHT OF. —** The legislature of a state may, unless restrained by the state constitution, grant away the power of taxation for a consideration, either permanently or for a specified period. *Whiting v. West Point*, 750.
 2. **DELEGATION OF LEGISLATIVE POWER — AUTHORIZING CERTAIN JUDGES TO APPOINT BRIDGE COMMITTEE IS NOT. —** It is not a delegation of legislative power for the legislature to authorize certain judges of the circuit court of the county to appoint the bridge committee provided for by the "Mensedorffer Act," nor is the authority so given in conflict with the constitution of Oregon. And moreover, the power to appoint may be upheld, on the ground that the judges, in performing this duty, act as individuals and not as judges. *State v. George*, 586.
- See DEDICATION; EMINENT DOMAIN, 2; HIGHWAYS, 1; MECHANIC'S LIEN, 2; MUNICIPAL CORPORATIONS, 11, 13; OFFICERS, 1, 3; RAILROADS, 17.

LIBEL.

1. **LANGUAGE USED BY NOTARY IN PROTESTING NOTE NOT LIBELOUS PER SE. —** The language which a notary usually employs in protesting a note is not libelous per se, especially when it appears therefrom that the note was protested before it had fully matured. *Hurstfield v. Fort Worth Nat. Bank*, 669.
2. **SPECIAL DAMAGES MUST BE ALLEGED IN ACTION FOR LIBEL WHEN. —** In an action for libel, where the words charged are not actionable per se, the plaintiff, in addition to an innuendo showing the injurious meaning

of the language, should allege some special injury or damage to himself arising as the natural and immediate consequence of its publication. *Hirshfeld v. Fort Worth Nat. Bank*, 660.

2. **DAMAGES FOR MENTAL ANGUISH NOT RECOVERABLE IN ACTION FOR LIBEL WHEN.** — Where the libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damages without proof of some other injury or damage. *Hirshfeld v. Fort Worth Nat. Bank*, 660.

LICENSE

See MUNICIPAL CORPORATIONS, 4.

LIENS

See ACTIONS, 1; ASSIGNMENT FOR BENEFIT OF CREDITORS; CREDITOR'S SUIT, 5; DAMAGES, 10; JUDGMENTS; MECHANIC'S LIEN.

LIMITATIONS OF ACTIONS.

1. **TWO YEARS' CLAUSE APPLICABLE TO LIABILITIES ARISING FROM TORTS.** — Section 339 of the California Code of Civil Procedure, which provides that an action upon a contract, obligation, or liability not founded upon an instrument in writing must be brought within two years after the cause of action shall have accrued, is applicable to all actions at law not specifically mentioned in other portions of the statute, and to liabilities arising in consequence of torts committed. *Lattin v. Gillette*, 115.
2. **CERTIFICATE OF TITLE GIVEN BY SEARCHER OF RECORDS NOT WITHIN FOUR YEARS' CLAUSE OF.** — Section 337 of the California Code of Civil Procedure, prescribing a four years' limitation, refers to contracts, obligations, or liabilities arising from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities, but does not apply to a certificate of title given by a searcher of records, where damages are claimed for his negligence in giving an incorrect certificate. *Lattin v. Gillette*, 115.
3. **STATUTE OF LIMITATION BEGINS TO RUN AGAINST ACTION FOR NEGLIGENCE AS SOON AS NEGLIGENCE IS COMPLETED.** — The statute of limitations begins to run against an action for misconduct or negligence from the date when the act of misconduct or negligence is completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract or the affirmative disregard of some positive duty. *Lattin v. Gillette*, 115.
4. **SEARCHER OF RECORDS — LIABILITY OF, FOR NEGLIGENCE.** — One who holds himself out as an examiner of titles is bound to exercise skill and care in making such examination, and is liable in damages for a failure to do so, but an action against him for damages resulting from his negligence in examining and reporting upon the condition of the title to real estate must be commenced within two years from the giving of the report, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land through a suit determined within two years before the commencement of the action for damages. *Lattin v. Gillette*, 115.
5. **TIME OF LIMITATION NOT PROLONGED BY WANT OF KNOWLEDGE OF NEGLIGENCE.** — The right to maintain an action for negligence is distinguished from the measure of damages, and although the entire damage resulting

from the negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged. *Lattie v. Gillette*, 115.

6. **JUDGMENT — REVIVOR.** — Where a judgment recovered in one state is there revived against the defendant without jurisdiction of his person, and after his removal to another state, such revivor will not prevent the running of the statute of limitations against the revived judgment in the latter state. *Hepler v. Davis*, 457.
7. **JUDGMENT, WHEN WILL NOT STOP RUNNING OF.** — A judgment or decree against heirs in a suit in one state, authorizing a sale of a decedent's land situated there to pay his debts, will not prevent the running of the statute of limitations against a suit in another state to subject his land situated therein to the payment of the same debts. *Hull v. Hull*, 800.
8. **ABSENCE FROM STATE.** — To prevent the running of the statute of limitations against a party because of his removal from the state, his absence must be such as will prevent the bringing of an action against him while absent. *Omaha etc. Land etc. Co. v. Parker*, 506.
9. **HUSBAND AND WIFE.** — **STATUTE OF LIMITATIONS** does not run against a wife on a note given her by her husband in payment of an ante-marriage debt due from him to her, and the presumption of payment from lapse of time will not prevail against her. *Second Nat. Bank v. Merrill*, 877.
10. **LACHES OF INFANT.** — An infant cannot be charged with his own laches, but when time has commenced to run against his ancestor, it continues to run against the minor heir. *Gibson v. Herriott*, 17.
11. **LIEN FOR PURCHASE-MONEY.** — The statute of limitations does not run against a lien for purchase-money of land reserved in a deed. *Hull v. Hull*, 800.

See **ADVERSE POSSESSION**, 5, 6; **EQUITY**, 5, 7; **INSURANCE**, 15; **JUDGMENTS**, 23.

LIVE-STOCK.

See **CARRIERS**, 1.

LUNATICS.

See **INSANE PERSONS**.

MAINTENANCE.

See **CHAMPERTY**.

MALICE.

See **EMINENT DOMAIN**, 2.

MANDAMUS.

JUDICIAL OPINIONS, RIGHT TO COPY AND PUBLISH. — *Mandamus* will not issue to compel the reporter of the decisions of the supreme court of errors of Connecticut to permit the applicant at all reasonable times to make copies of such opinions in the custody of the reporter, or to furnish certified copies thereof, at the usual and reasonable rates of compensation, for publication out of the state, in advance of their official publication by the reporter. *Peck v. Hooker*, 215.

MANSLAUGHTER.

See **HOMICIDE**, 13.

MARRIAGE AND DIVORCE.

1. **DIVORCE — EXTREME CRUELTY AS GROUND FOR — HOW DETERMINED. —**
What acts of a spouse constitute extreme cruelty within the meaning of a statute making this a ground for a divorce cannot be defined with precision, but each case is to be determined according to its own peculiar circumstances, by the court or jury keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party. *Fleming v. Fleming*, 124.
2. **DIVORCE — PRESUMPTION THAT IMPROPER ACTS OF HUSBAND WILL PRODUCE NATURAL EFFECT UPON WIFE. —** Where the voluntary conduct of a husband is inconsistent with marital integrity, it is conclusively presumed that he intended the natural and ordinary effect thereof upon his wife, and the law will not condone his offense on the ground that his acts were not willfully done to annoy or vex her, and that he did not suppose any publicity would be given to them, or that she would be told about them. *Fleming v. Fleming*, 124.
3. **DIVORCE — FINDING RESPECTING GRIEVOUS MENTAL SUFFERING CONCLUSIVE WHEN. —** When a complaint by a wife, in an action for divorce on the ground of extreme cruelty, charges that the defendant attempted to have sexual intercourse with their domestic, and that his conduct received great publicity on account of a complaint having been made by the domestic before a magistrate charging the defendant with assault with intent to commit a rape upon her, and that afterwards he threatened to turn the plaintiff out upon the world penniless unless she would help him to keep the domestic from prosecuting him on the complaint, and that such conduct on the part of defendant, and the publicity given to it, caused the plaintiff grievous mental suffering, thereby greatly impairing her health, it cannot be said, as a matter of law, that such conduct did not inflict grievous mental suffering upon her, and a finding by the court that it did is, in the absence of evidence in the record, conclusive upon appeal. *Fleming v. Fleming*, 124.
4. **DIVORCE — GRIEVOUS MENTAL SUFFERING, WHAT IS, IS A QUESTION OF FACT. —** Whether or not, in any given case, one of the spouses has inflicted upon the other grievous mental suffering, is a pure question of fact, to be deduced from all the circumstances of such case. *Fleming v. Fleming*, 124.
5. **DIVORCE ON THE GROUND OF INTOLERABLE CRUELTY. —** Sexual intercourse demanded and persisted in by a husband in a rash, rough, and unreasonable manner, when he knows that the condition of his wife is such that it will inflict suffering and injury upon her, and that she cannot properly and safely accede to his wishes, renders him guilty of such intolerable cruelty as entitles her to a divorce. *Mayhew v. Mayhew*, 195.
6. **HUSBAND AND WIFE — MARITAL DUTIES. —** While it is the duty of the wife to submit to sexual intercourse with her husband, it is also his duty to forbear at her reasonable request, and when she cannot properly and safely accede to his wishes. *Mayhew v. Mayhew*, 195.
7. **DIVORCE, HABITUAL GROSS DRUNKENNESS AS GROUND FOR. —** Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. *McBee v. McBee*, 613.

See WITNESSES, 1, 3-6.

MARRIED WOMEN.

See ACKNOWLEDGMENT; HUSBAND AND WIFE; TRUSTS, &

MASTER AND SERVANT.

1. **IT IS A MASTER'S DUTY TO EXERCISE REASONABLE CARE** to procure for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and competent persons as his co-laborers, and the performance of these duties cannot be avoided by the simple giving of an order by which their execution is intrusted to another. *McElligott v. Randolph*, 181.
2. **MASTER'S RESPONSIBILITY** in case of injury to his servant is to be determined, not by the rank or grade of the servant through whose neglect the injury was suffered, but by the character of the particular act or the occasion to which the injury was attributable. *McElligott v. Randolph*, 181.
3. **EMPLOYER OF MINOR WITHOUT PARENT'S CONSENT LIABLE FOR INJURY TO HIM WHEN.** — One who employs a minor, knowing him to be such, in a dangerous business, without his father's consent, becomes liable to compensate the father for any loss of the son's service during minority which may result from an injury suffered in that business; and no question of contributory negligence, or as to whether the injury resulted from the negligence of the minor's fellow-servants, can arise in such case. The father is a stranger to the contract of employment, and is not bound by any of its terms. *Texas etc. R'y Co. v. Brick*, 675.
4. **ONE IS A VICE-PRINCIPAL, AND NOT A FELLOW-SERVANT**, when he is selected to superintend work which is dangerous without such supervision and without the selection of proper appliances, and the persons whom he is to superintend have not, without his supervision, the mechanical knowledge requisite for the selection of such materials and the safe performance of the work. *McElligott v. Randolph*, 181.
5. **VICE-PRINCIPAL, LIABILITY FOR NEGLIGENCE OF.** — A master cannot, by delegating the performance of his duties to another, relieve himself from responsibility for injuries resulting from the failure of the agent or vice-principal to exercise that degree of care which would have relieved the principal from liability had he undertaken the performance of his duties in person. *McElligott v. Randolph*, 181.
6. **VICE-PRINCIPAL'S ABANDONMENT OF HIS DUTIES.** — The selection by a master of a competent person to superintend the execution of work will not deprive a servant of the right to recover of the principal for injuries received in doing such work, and occasioned by such superintendent's absenting himself and leaving the selection of the means and manner of attempting to perform the work in the hands of inexperienced and incompetent men. *McElligott v. Randolph*, 181.
7. **RISK ASSUMED BY SERVANT — CONTRIBUTORY NEGLIGENCE.** — In an action to recover for the death of an employee, alleged to have been caused by the negligence of the master, the fact that such employee knew of the habitual use of his employer's machinery in a particularly dangerous and unlawful way, and remained in the service without objection, is evidence of contributory negligence on the part of the employee. *Abbot v. McCadden*, 910.
8. **CONTRIBUTORY NEGLIGENCE.** — Where two positions are apparently equally safe, a servant is not chargeable with contributory negligence because he chooses the one which proves to be unsafe and is there in-

jured, through the negligence of a vice-principal. *McElligott v. Randolph*, 181.

2. **CONTRIBUTORY NEGLIGENCE.** — The fact that an employee was advised to go home, but, disregarding the advice, continued at work, and while working in the service of his master, was killed through the neglect of a vice-principal, does not charge the servant with contributory negligence, nor relieve the master from liability, though had the servant gone home, he would not have been exposed to danger. *McElligott v. Randolph*, 181.

See RAILROADS, 4, 11, 12, 14, 15.

MECHANIC'S LIEN.

1. **THE RIGHTS OF CLAIMANTS** of mechanics' liens are purely statutory, and the statute, as it gives particular privileges to creditors, should be construed with reasonable strictness. *Wilcox v. Woodruff*, 222.
2. **MECHANIC'S LIEN NOT ENFORCED AGAINST PUBLIC BUILDINGS.** — Builders' and mechanics' liens can only be created against public buildings and grounds when the right is expressly conferred by the statute, and the grant of a lien against "all buildings" will not be held to include public buildings and grounds, unless they are, by the express terms of the statute, included within its operation. The legislature of Texas has not named this class of public property as affected by such liens, nor has it prescribed any method by which they can be fixed or enforced. *Atascosa County v. Angus*, 637.
3. **WHERE THREE SEPARATE, INDEPENDENT BUILDINGS**, on the same lot, belonging to the same person, are built at the same time, one who furnishes material and performs labor under one contract, keeping no account of the amount due from each house, cannot file and enforce a mechanic's lien covering the entire lot and all the buildings, under a statute creating a lien upon every building in the construction or repair of which labor is done or materials furnished. The statute must be construed as giving a lien on each building separately, and unless the claimant can state the amount due from each, he must fail. *Wilcox v. Woodruff*, 222.
4. **PARTNERSHIP.** — Where two of three partners, holding the legal title to a lot, contract in the name of the firm for materials used in the construction of a building thereon, a mechanic's lien attaches to the lot and the building. *Hoagland v. Lusk*, 485.
5. **MECHANIC'S LIEN IS NOT WAIVED** by accepting the note and chattel mortgage of the debtor as collateral security for materials furnished and used by the mortgagee in the construction of the mortgagor's building, unless such is clearly shown to have been the intention of the parties. *Hoagland v. Lusk*, 485.
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MEETINGS.

See CORPORATIONS, 8-10.

MENTAL ANGUISH.

See DAMAGES, 5; LIBEL, 3; MARRIAGE AND DIVORCE, 3, 4.

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MEETINGS.

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See DAMAGES, 5; LIBEL, 3; MARRIAGE AND DIVORCE, 3, 4.

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See EVIDENCE, 4.

MINES.

COAL MINERS — DUTY OF, WITH RESPECT TO DÉBRIS. — If a corporation authorized to mine for coal so places its slack and refuse upon the surface of its own land that they may be expected, in the ordinary course of events, to wash down and finally reach the lands of others, to their damage, such corporation is liable to the land-owner injured by the washing of such slack and refuse into a creek passing through his land, causing it to overflow its banks, inundate his land, and cover parts of it with *débris*; nor can the company escape liability on the ground that what it did was necessary to the successful conduct of its business. *Columbus etc. Coal etc. Co. v. Tucker*, 528.

See CORPORATIONS, 5; CUSTOM, 2.

MISDEMEANOR.

See HOMICIDE, 1, 2; NUISANCE, 2.

MISREPRESENTATIONS.

See INSURANCE, 3; MISTAKE.

MISTAKE.

1. **MISTAKE OF LAW CAUSED BY FRAUD**, imposition, or misrepresentation may be relieved against in equity. *Kyle v. Fehley*, 866.
 2. **DEEDS, REFORMATION OF, FOR MISTAKE.** — When an aged German woman, unacquainted with business forms, has agreed to convey land subject to a lease, and is subsequently induced by the false representations of the grantee to execute a warranty deed making no mention of such lease, she is entitled to have the deed reformed in equity, so as to conform it to the agreement of the parties. *Kyle v. Fehley*, 866.
- See ASSUMPSIT; CARRIERS, 2; DEEDS, 3; DEVISE; EQUITY, 2; INSURANCE, 2.

MONOPOLY.

See CONTRACTS, 21, 23; INJUNCTION, 4.

MORTGAGES.

CONVEYANCE — WHEN MORTGAGE AND WHEN A DEED OF TRUST. — In determining whether a conveyance is to be treated as a mortgage or as a deed of trust, the fact that it was made directly to a creditor of the grantor, and not to a third party, is immaterial, since that question must depend upon the essential character of the instrument, as shown by its terms, and not upon whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. *More v. Callins*, 128.

See CONTRACTS, 14; CORPORATIONS, 8; DEEDS, 3; INSURANCE, 1, 6; JUDGMENTS, 18, 19; MECHANIC'S LIEN, 5; PROCESS, 2; SPECIFIC PERFORMANCE, 4; TRUSTS, 6.

MULTIPLICITY OF SUITS.

See INJUNCTION, 1.

MUNICIPAL CORPORATIONS.

1. **POWERS.** — A municipal corporation is a mere local agency of the state, having only such powers as are clearly and unmistakably granted by the state, and the powers so granted are strictly construed. *Whiting v. West Point*, 750.
2. **ORDINANCE TAXING INSURANCE AGENCIES.** — A city having authority to license and tax all insurance agencies has power to compel each insurance agent to pay a separate tax for each company represented by him. *Simrall v. Covington*, 398.
3. **ORDINANCE TAXING INSURANCE AGENTS — WHEN VOID FOR DISCRIMINATION.** — A municipal ordinance imposing a tax upon agents of insurance companies not located within the city, which is not imposed upon agents of companies located therein, and requiring the agent to pay a separate tax for each outside company represented by him, is void, as being an unjust and oppressive discrimination against agents of insurance companies not located within the city. *Simrall v. Covington*, 398.
4. **ORDINANCE TAXING INSURANCE AGENTS — WHEN VOID FOR DISCRIMINATION.** — An ordinance imposing a license upon agents of insurance companies not located in the city which is not imposed upon agents of companies located therein, and giving any resident of the city who has procured a license to transact business for such company not located therein the right to employ as many solicitors as he may desire, which right is not given to non-resident agents, is void, as an unjust discrimination against agents who are not residents of the city. *Simrall v. Covington*, 398.
5. **ORDINANCE, WHEN VOID AS DISCRIMINATION.** — A municipal ordinance which not only discriminates between residents of the city enacting it and those residing outside of it, whether within or without the state, but also places a burden upon some of its residents, while others engaged in similar business are exempt, is unreasonable and void, as partial legislation. *Simrall v. Covington*, 398.
6. **ORDINANCES — VALIDITY OF.** — A municipal ordinance enacted under a general grant of power or by virtue of incidental authority, if unfair and partial in its operation, will be declared void. Ordinances purporting to regulate callings, or otherwise, must preserve equality of right. *Simrall v. Covington*, 398.
7. **POWER TO TAX OR TO EXEMPT FROM TAXATION** is sovereign, and can be exercised by a municipality only in the manner delegated by the state. *Whiting v. Commonwealth*, 750.
8. **POWER TO EXEMPT PROPERTY FROM TAXATION.** — A municipal corporation has no inherent power to exempt from taxation any property which, by its charter, it is authorized to tax; and when it possesses the delegated authority to tax all property within its limits, it can exempt none. *Whiting v. West Point*, 750.
9. **CONFLICT OF LAWS.** — WHEN, AFTER A LIABILITY ACCRUES AGAINST A MUNICIPAL CORPORATION, its capacity to levy taxes is increased by its reorganization under a general corporation act, the amount which may be applied to the satisfaction of the judgment is not limited to the taxing capacity of the municipality when the liability arose. *Carney v. Marseilles*, 328.
10. **CONFLICTING RIGHTS OF TELEPHONE AND ELECTRIC RAILWAY CORPORATIONS THEREIN.** — If a telephone company is by a municipal corporation granted the right to erect poles and wires upon the public streets,

and to carry on the business of a telephone corporation, and the board of public works of the municipality has power to consent to the use by street-railway corporations of any motive power, then the grant to the telephone corporation is received subject to the right of the board of public works to exercise the powers thus vested in it, and if the board subsequently grants to a street-railway corporation the right to use the single-trolley system of electric railways upon the public streets, the telephone corporation cannot enjoin such use because the ground circuit of such trolley system necessarily interrupts the telephone business, and thereby impairs the value of the franchise granted to the telegraph corporation. *Cincinnati etc. R'y Co. v. Telegraph Ass'n*, 559.

11. **STREETS, EXCLUSIVE RIGHT TO USE.** — A municipal corporation cannot, without clear legislative authority, grant the exclusive right to the use of streets for certain purposes to an individual or corporation. *Cincinnati etc. R'y Co. v. Telegraph Ass'n*, 559.
12. **DURATION OF FRANCHISE, BY WHOM DETERMINED.** — Where the common council of a city has legislative authority to grant a street-railway franchise, the time for which it may be granted is a matter for its exclusive determination. *Mayor v. Houston etc. R'y Co.*, 679.
13. **AUTHORITY TO GRANT STREET-RAILWAY FRANCHISE AND EXTEND IT FOR TERM OF YEARS.** — The legislature, by providing in the act chartering a street-railway company "that all contracts made and entered into by and between the mayor and aldermen of the city of Houston and the said company, or any privileges or rights granted by the said mayor and aldermen of the city of Houston to the said company, shall be in all respects legal and binding on the aforesaid contracting parties," and in the charter of the city that "the city council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts, and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets; to control and regulate everything concerning street-railways," — clearly intended to confer and did confer upon the city council ample authority to grant a franchise to the street-railway company, and to extend it for a term of years. *Mayor v. Houston etc. R'y Co.*, 679.
14. **STREETS — ABDICATION OF CONTROL OVER.** — A municipal corporation has no power to grant any consent, or make any contract, or adopt any ordinance the effect of which would be to relinquish control over its streets, or to abandon its duty to keep them in repair, and any grant conferring upon a railroad corporation the right to use such streets must be held in subordination to the right and duty of the municipality to improve and keep them in repair. *Chicago etc. R. R. Co. v. Quincy*, 334.
15. **STREETS, CONTROL OVER.** — The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage. For those purposes a city may improve and control them and adopt all needful rules and regulations for their management and use, but cannot alienate or otherwise dispose of them. *Chicago etc. R. R. Co. v. Quincy*, 334.
16. **RIGHT TO PAVE STREETS OCCUPIED BY A RAILWAY.** — Though a portion of a street is occupied by the tracks of a railway corporation under a grant from the municipality conferring such right, the city council has a right to take measures for paving the street, notwithstanding the fact

that the railway has its tracks therein, and is using them from day to day, and the business of the corporation may suffer serious interruption during such paving. *Chicago etc. R. R. Co. v. Quincy*, 334.

17. **THE POWER TO IMPROVE STREETS**, like other legislative powers, is a continuing one, and the municipal authorities are the exclusive judges of the necessity and propriety of its exercise. *Chicago etc. R. R. Co. v. Quincy*, 334.
18. **STREETS, CONTROL OF.** — As against a lot-owner, though he holds the fee of the streets subject to the public easement therein, a city has an undoubted right to open and fit for use and travel a street over which the public easement extends to its entire width, and whether it shall be so opened and improved is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed, and with this discretion the courts will not ordinarily interfere. *Chase v. Oshkosh*, 898.
19. **LIABILITY OF, FOR DAMAGE TO PROPERTY IN GRADING AND SEWERING ITS STREETS.** — Under the constitution of Texas, a city is liable for damage to private property resulting from the overflow of water caused by its raising the grade of the street above the adjoining lots, and its failure to provide a sufficient sewer to carry off the water, notwithstanding it has authority by its charter to grade its streets and lay sewers therein. *Cooper v. Dallas*, 645.
20. **OPENING AND GRADING STREETS — LIABILITY FOR CONSEQUENTIAL DAMAGES.** — A municipal corporation, acting within the scope of its powers, and with reasonable care and skill, in opening and grading its streets, is not liable to an adjoining owner, whose land is not taken, for consequential damages, in the absence of any constitutional or statutory provision on the subject. *Stearns v. Richmond*, 758.
21. **LATERAL SUPPORT — LIABILITY OF MUNICIPAL CORPORATION FOR REMOVING.** — When a city, in altering the grade of a street, excavates to the depth of sixty feet, thereby causing adjoining land to cave so as to destroy the walls of brick buildings thereon, twenty feet from the street, there is a direct taking of such adjoining land, and a destruction of its lateral support, for which the city is liable to the owner for the resulting damages. *Stearns v. Richmond*, 758.
22. **STREETS. — SHADE-TREES STANDING IN A PUBLIC STREET**, near the line of the sidewalk, may be cut down and removed by the municipal officers in pursuance of the authority which the city possesses over its streets and sidewalks; and no action can be maintained by the owners of the trees on account thereof. Whether the trees are obstructions to travel, and ought to be removed to make the sidewalk reasonably safe therefor, is a matter within the quasi legislative discretion conferred on the common council of a municipality, when its charter gives such council power to prevent the encumbering of the sidewalks, and to control and regulate the streets, and to remove and abate every obstruction and encroachment thereon. *Chase v. Oshkosh*, 898.
23. **LIABILITY FOR SEWERS NEGLIGENCELY CONSTRUCTED.** — When a sewer controlled by a city is so negligently constructed or altered by a private individual under authority and aid from the city as to cause water and filth to flow upon private property, which would not otherwise have flowed there, the city is liable in damages for the injury resulting therefrom. *Chalkley v. Richmond*, 730.

24. **DEFECTIVE SEWERS.** — A sewer controlled by a city, which is so negligently constructed or altered as to cause water and excrement to flow into the cellar of a private owner, is a nuisance for which the city is liable in damages, after notice to abate it. *Chalkley v. Richmond*, 730.
25. **STREETS AND HIGHWAYS.** — A MUNICIPAL CORPORATION CANNOT ESCAPE LIABILITY to a person injured by the want of repair of a bridge, on the ground that it was unable, for want of funds, to place such bridge in repair, if, instead of closing the bridge, it keeps it open for travel as a part of one of its public highways. *Carney v. Marseilles*, 328.
26. **STREETS — ESTOPPEL.** — The fact that an obstruction has been permitted to remain in a public street for a long time without objection, or that the street has never been used as such, cannot estop the public authorities from removing such obstruction and opening and fitting the street for public use to its entire width. *Chase v. Oshkosh*, 898.
27. **LIABILITY FOR NUISANCE.** — A city authorized to abate a nuisance is, after notice of its existence, liable for failure to exercise the power. *Chalkley v. Richmond*, 730.
28. **STREET ASSESSMENTS.** — AN ORDINANCE SPECIFYING THAT A STREET IS TO BE PAVED TO THE WIDTH OF THIRTY-SIX FEET sufficiently specifies the portion to be paved, when the whole street is sixty-six feet wide, and the parts actually taken up by the sidewalks occupy thirty feet. *Chicago etc. R. R. Co. v. Quincy*, 334.
29. **STREET ASSESSMENTS.** — LANDS MUST BE REGARDED AS ADJACENT TO A STREET improvement when separated therefrom by sidewalks only. *Chicago etc. R. R. Co. v. Quincy*, 334.
30. **MUNICIPAL CORPORATION, NOT BOUND BY INDIVIDUAL ACTS OF MEMBERS OF ITS COUNCIL WHEN.** — When the liability of a municipal corporation depends on the action of its common council, such action must be had at a meeting thereof duly convened in some manner provided by law. Such liability cannot be based on individual acts of members of the council not done at an official meeting. *Murphy v. Albina*, 578.
31. **MUNICIPAL CORPORATION, RATIFICATION BY, OF UNAUTHORIZED ACTS, HOW MADE.** — A municipal corporation may become liable for services performed for it under the direction of its officers and agents, though in excess of their authority, provided they are accepted and ratified by it after being brought to its official knowledge; but mere silence or acquiescence on its part will not amount to a ratification; there must be some affirmative action in that respect, or action from which ratification can be inferred. *Murphy v. Albina*, 578.
- See AGENCY, 8; APPEAL, 8; CONSTITUTIONS; DEDICATION; EMINENT DOMAIN, 1, 2, 6, 9; EQUITY, 1; HIGHWAYS, 1; NUISANCE, 1; RAILROADS, 16-18; REAL PROPERTY, 1; TAXES, 5, 6; WATER COMPANIES.

MURDER.

See HOMICIDE.

MUTUAL BENEFIT SOCIETIES.

See ASSOCIATIONS.

NEGLIGENCE.

1. **CONTRIBUTORY.** — TO PASS IN FRONT OF A RAPIDLY MOVING TRAIN TO SAVE THE LIFE of a child of tender years is not negligence per se, though

the person thus risking his life is under no legal obligation to rescue the child, and might, had he chosen to do so, have stood by and permitted it to be killed without violating any rule of law, civil or criminal. In the presence of the impending peril to the child, and the necessity for instantaneous action if its life were to be saved, it would be unreasonable to require deliberate judgment from one in a position to afford relief. *Pennsylvania Co. v. Langendorf*, 553.

2. **RAILROADS — LIABILITY TO PASSENGER LEAPING FROM TRAIN.** — Where a passenger, through the negligent or unskillful operation of its trains by a railroad company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he is entitled to recover damages, although he would not have been injured if he had remained on the train. *St. Louis etc. R'y Co. v. Murray*, '32.

3. **RAILROADS — PASSENGER LEAPING FROM TRAIN — EVIDENCE.** — In an action by a passenger to recover damages for an injury received in leaping from a railroad train to avoid a threatened peril, the opinions, declarations, and acts of other passengers at the time are admissible in evidence to show how the situation appeared to the party injured, and to his fellow-passengers, and whether he acted as a man of ordinary prudence would have acted under the same circumstances or not. *St. Louis etc. R'y Co. v. Murray*, 32.

4. **NEGLIGENCE OF PARENT, WHEN IMPUTABLE TO CHILD.** — In an action by a parent to recover for loss of service caused by an injury to his child, the contributory negligence of the parent is a good defense, but such negligence is not imputable to a child *non sui juris*, when the action is by the child or its personal representative. *Norfolk etc. R. R. Co. v. Groseclose*, 718.

5. **RAILROADS — CONTRIBUTORY NEGLIGENCE OF PARENT NOT IMPUTABLE TO CHILD.** — In an action by a child of tender years and *non sui juris*, or by its personal representative, against a railroad company to recover for negligent injury to such child, the contributory negligence of its parent is not imputable to it. *Norfolk etc. R. R. Co. v. Groseclose*, 718.

6. **A PARENT IS NOT GUILTY OF NEGLIGENCE PER SE** in buying and giving to his son, eleven years of age, an air-gun of the kind commonly used by boys as a toy, and shooting with force sufficient to kill or wound a small bird, or dent a board, or destroy the eye of a human being; and such parent cannot be held answerable because his son loaned the gun to another boy, who shot at plaintiff and struck him in the eye, destroying that organ. *Harris v. Cameron*, 891.

7. **WHEN A QUESTION FOR THE COURT.** — If the evidence in a cause is plain and positive, admitting of no doubt or controversy, the question of negligence is for the court as a question of law. *Harris v. Cameron*, 891.

8. **DEGREE OF, QUESTION FOR JURY.** — When, in an action to recover for personal injury against a railroad company, the evidence is conflicting as to the question of negligence, it is for the jury to decide whether it is gross or ordinary. *Louisville etc. R. R. Co. v. Minogue*, 378.

See **CARRIERS**, 1; **CUSTOM**, 3; **DAMAGES**, 4-6, 14; **EVIDENCE**, 8; **LIMITATIONS OF ACTIONS**, 2-5; **MASTER AND SERVANT**, 3, 5, 7-9; **MUNICIPAL CORPORATIONS**, 23, 24; **NEW TRIAL**, 3; **RAILROADS**, 4, 8, 13-15; **WATER COMPANIES**, 2.

NEGOTIABLE INSTRUMENTS.

1. **PRE-EXISTING DEBT IS VALUABLE CONSIDERATION.** — One who acquires a negotiable promissory note in payment of an existing debt is a purchaser for value and in the usual course of trade. *Herman v. Gunter*, 632.
2. **CONSIDERATION.** — **THE WITHDRAWAL OF A CIVIL ACTION** against a minor son of the maker of a note is a consideration sufficient to support it, when such son had been arrested in the action, and his release was procured by the execution of a note and the consequent dismissal of the action. *Mascolo v. Montecanto*, 170.
3. **IMPEACHING CONSIDERATION — BURDEN OF PROOF.** — In an action upon a negotiable note, brought by a remote indorsee against the maker, who undertakes to impeach the consideration, the law imposes upon the defendant the double burden of establishing not only the failure of the original consideration for the note, but also that the plaintiff acquired the same with notice, or without paying a valuable consideration. *Herman v. Gunter*, 632.
4. **FAILURE OF CONSIDERATION — BONA FIDE HOLDER.** — A holder of negotiable paper, who purchases it before maturity, for a valuable consideration, in the ordinary course of business, with knowledge that it was made in consideration of an executory contract of warranty between the original parties, but without knowledge of the failure of the warranty, or of facts sufficient to put him on inquiry until after his purchase, takes it free from any defense by the maker because of the breach of warranty. *Rublee v. Davis*, 509.
5. **BONA FIDE HOLDER.** — One who purchases negotiable paper before its maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, or which ought to excite suspicion in the mind of a prudent man, is a *bona fide* holder, and takes the paper free from defense on the part of the maker. *Rublee v. Davis*, 509.
6. **THE PURCHASER** of a negotiable instrument, before due, in the usual course of trade, for a valuable consideration, is entitled to enforce it, though he took it under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man, unless such circumstances further showed that he acted in bad faith or with a want of honesty. *Kitchen v. Loudenback*, 540.
7. **PURCHASER OF, MAY RECOVER FACE VALUE OF, WHEN.** — The purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity. *Petri v. First Nat. Bank*, 657.
8. **A BONA FIDE PURCHASER** of a negotiable instrument who pays less than its face value is entitled to recover its face with interest, though it was procured by fraud, and could not have been enforced by the original payee. *Kitchen v. Loudenback*, 540.
9. **INDORSEMENT BY BONA FIDE HOLDER OF NEGOTIABLE NOTE, EFFECT OF.** — A holder of a negotiable note from a *bona fide* indorsee takes it discharged from inquiry into its consideration, whether he has notice, or pays value or not. He has the rights of the *bona fide* holder through whom he claims. *Herman v. Gunter*, 632.

10. **NEGOTIABLE NOTE, WITHOUT GRACE, FALLING DUE ON SUNDAY — DEMAND AND PROTEST, WHEN TO BE MADE.** — When a negotiable note, without days of grace, falls due on Sunday, payment thereof cannot be required, nor protest made, on the preceding Saturday, but presentment and protest should be made on the following Monday, unless that is also a legal holiday. The statutes of Texas have not changed this rule. *Hirshfield v. Fort Worth Nat. Bank*, 660.
11. **PROTEST OF NOTE PREMATURE AND WRONGFUL WHEN.** — The protest of a negotiable note, without days of grace, falling due on Sunday, is premature and wrongful if made on the preceding Saturday. *Hirshfield v. Fort Worth Nat. Bank*, 660.
- See **ATTORNEY AND CLIENT**, 2; **CHATTEL MORTGAGES**, 2; **CONTRACTS**, 14; **CORPORATIONS**, 7; **DAMAGES**, 11; **ESTOPPEL**, 4; **FRAUDULENT CONVEYANCES**, 5, 7-9; **LIBEL**, 1; **MECHANIC'S LIEN**, 6.

NEW TRIAL

1. **EMINENT DOMAIN.** — A NEW TRIAL MAY BE GRANTED TO A TENANT in eminent domain proceedings without extending the same privilege to his landlord, both having been awarded compensation for their respective interests, and the award in favor of the tenant being erroneous, while that in favor of the landlord was correct. *Stubbings v. Houston*, 300.
2. **DAMAGES — EXCESSIVE.** — WHEN A VERDICT for damages, compensatory or punitive, or both, is for so large an amount that it can be accounted for only as the result of an improper sympathy or unreasonable prejudice, it will be set aside as excessive. *Louisville etc. R. R. Co. v. Minogue*, 378.
3. **DAMAGES, WHEN EXCESSIVE.** — When, in an action against a railroad company to recover for an injury received through its alleged gross negligence, the proof fails to show bad motive or purpose to injure, or a neglect so wanton as to demand the severest punishment, and it is utterly uncertain what the result of the injury will be, a verdict for ten thousand dollars will be deemed to be the result of prejudice or undue sympathy, and will be set aside as excessive. *Louisville etc. R. R. Co. v. Minogue*, 378.
4. **REFUSAL TO REOPEN CASE FOR FURTHER EVIDENCE NO ABUSE OF DISCRETION WHEN.** — The refusal of a trial court to reopen a case, after the close of the trial, for the purpose of allowing additional evidence to be introduced, is not an abuse of discretion, where no excuse is shown for not having produced the evidence at the trial. *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 85.

See **APPEAL**, 11; **DAMAGES**, 14; **JUDGMENTS**, 15; **TRIAL**, 5, 12.

NOTARIES PUBLIC

- EXTORTION, TAKING NOTARIAL FEES FOR PREMATURE PROTEST IS NOT.** — Where a notary, in ignorance of the law, makes a premature protest of a note, and for so doing takes the ordinary and usual fees charged for protesting, such taking is not extortion within the meaning of the criminal statute, nor can the amount paid be recovered back, the payment having been voluntarily made. *Hirshfield v. Fort Worth Nat. Bank*, 660.

See **INSURANCE**, 6; **LIBEL**, 1.

NOTICE.

See CHATTEL MORTGAGES, 3-5; CORPORATIONS, 7-10; EQUITY, 6, 7; INTER-
PEL, 1, 2; EXECUTION, 6; INSURANCE, 6; RAILROADS, 10.

NUISANCE.

1. **STREETS AND HIGHWAYS.** — A PERMANENT OBSTRUCTION, SUCH AS TREES, standing within a sidewalk or traveled street, constitutes *per se* a public nuisance, which may be summarily removed by direction of the common council of a municipality. *Chase v. Oshkosh*, 893.
2. **STATUTORY NUISANCE — COMMON-LAW REMEDY FOR.** — When a statute has declared that certain acts constitute a nuisance, and that any person intentionally doing them shall be deemed guilty of a misdemeanor, the common law, if an individual is injured, will supply a civil remedy, though the statute gives none. *Columbus etc. Coal etc. Co. v. Tucker*, 523.
See MUNICIPAL CORPORATIONS, 24, 27.

OATH.

See TRIAL, 3, 4.

OFFICERS.

1. **POWER TO APPOINT, NOT EXCLUSIVELY EXECUTIVE, BUT MAY BE EXERCISED BY LEGISLATURE.** — The power to appoint to office is not a power belonging exclusively to the executive branch of the government of Oregon, but may, in some instances, be exercised by the legislature. *State v. George*, 586.
 2. **MEMBERS OF BRIDGE COMMITTEE, UNDER "MEUSSDORFFER ACT," ARE NOT.** — The members of the bridge committee provided for by the Oregon act of February 18, 1891, known as the "Meussdorffer Act," are not officers within the meaning of that term as used in the constitution of that state, but mere agents of the city of Portland for the performance of certain duties defined by the act. *State v. George*, 586.
 3. **ELIGIBILITY OF MEMBER OF LEGISLATURE TO SERVE ON BRIDGE COMMITTEE UNDER "MEUSSDORFFER ACT."** — A member of the legislature which enacted the "Meussdorffer Act" is not disqualified to serve, during the term for which he was elected, as a member of the bridge committee created by the act, since the position of a member of that committee is not an office within the meaning of the constitution. *State v. George*, 586.
- See EQUITY, 1; EXECUTION, 3; HOMICIDE, 1-3; JURISDICTION, 7; MUNICIPAL CORPORATIONS, 30, 31; PROCESS, 1.

OPTION.

See CHATTEL MORTGAGES, 6; CONTRACTS, 30.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

PARENT AND CHILD.

1. **CUSTODY OF CHILD.** — The father is the natural guardian of his infant children, and in the absence of good and sufficient cause, is entitled to their custody, care, and education. *Green v. Campbell*, 843.

2. **CUSTODY OF CHILD.** — When a child is not in the custody of its father, and he is seeking to recover it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if it is of years of discretion; and if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody. *Green v. Campbell*, 843.
 3. **TRANSFER OF CUSTODY OF CHILD BY FATHER.** — The custody and control of an infant will not be restored to the father when he has transferred such custody to another by agreement, to the manifest welfare of the child, unless he is able to show that such change of custody will materially promote its moral and physical welfare. *Green v. Campbell*, 843.
 4. **LOSS OF SERVICE OF DECEASED CHILD NEED NOT BE ALLEGED IN COMPLAINT IN ACTION FOR HIS DEATH.** — In an action by a parent for the death of his minor child, the complaint need not specially allege the loss of the services of the deceased. Such loss is not special damage, necessary to be averred, but is a natural and necessary sequence of the death. *Morgan v. Southern Pac. Co.*, 143.
- See **CONTRACTS**, 3; **DAMAGES**, 4-6, 8, 9, 13, 14; **EVIDENCE**, 8; **FRAUDULENT CONVEYANCES**, 8, 9; **MASTER AND SERVANT**, 3; **NEGLIGENCE**, 4-6; **NEGOTIABLE INSTRUMENTS**, 2; **SPECIFIC PERFORMANCE**, 5.

PARTIES.

See **APPEAL**, 1; **CORPORATIONS** 4, 11; **CREDITOR'S SUIT**, 1-3; **CRIMINAL LAW**, 1; **FRAUDULENT CONVEYANCES**, 1; **JUDGMENTS**; **JUDICIAL SALES**, 5.

PARTITION.

See **JUDGMENTS**, 3.

PARTNERSHIP.

1. **INCORPORATORS OF UNORGANIZED CORPORATION NOT LIABLE AS PARTNERS.** — Where three or more persons execute and file articles of incorporation under the laws of Oregon, and do nothing further towards effecting an organization or carrying on the proposed business, they do not thereby become liable as partners, although one of them assumes the corporate name, under which he does business and incurs liabilities. *Rutherford v. Hill*, 596.
2. **PARTNERSHIP IN LANDS, ASSETS OF, WHEN TREATED AS PERSONALTY IN EQUITY.** — Lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement, and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets. When the existence of such a partnership is proved, the rights and obligations of the respective partners are to be determined upon the same principles and with the same results as in other partnerships. *Bates v. Babcock*, 133.
3. **PARTNERSHIP IN LANDS — ALLEGATIONS AS TO, IN COMPLAINT.** — An allegation in a complaint that the defendants agreed, upon certain terms, to become equal partners with the plaintiff in certain lands, shown by other allegations of the complaint to have been held by the plaintiff upon a dry, naked trust for third parties, and to have been purchased from the beneficiaries and transferred to another person as trustee for

plaintiff and defendants, does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with other averments of the complaint, that they were to share equally all sums received for the property, and all profits and losses accruing on account thereof, shows that the agreement was for a partnership in the profits that might result from dealing in the lands, and had no necessary relation to the ownership of the land. *Bates v. Babcock*, 133.

4. **STATUTE OF FRAUDS NO DEFENSE TO ACTION FOR DIVISION OF PROCEEDS OF SALE OF LANDS BY PARTNERSHIP.** — In an action for a division of the proceeds of a sale of lands made under an oral partnership agreement for dealing in lands, the statute of frauds is no defense, and the same principles that apply to such an action are applicable in an action to subject lands which have become a portion of the assets of such a partnership to a sale and distribution of the proceeds among the partners, under the direction of a court of equity. *Bates v. Babcock*, 133.
5. **TRUST RESULTING BY OPERATION OF LAW IN LANDS ACQUIRED BY.** — If, upon sufficient evidence, a partnership between parties for dealing in lands is proved, they will have an interest in the land which forms a portion of the assets of the partnership, resulting by operation of law as an incident to such partnership, but that fact will not constitute a reason for excluding parol evidence to establish the existence of the partnership. *Bates v. Babcock*, 133.
6. **SOURCE OF TITLE TO ASSETS NOT INQUIRED INTO IN SETTLING ACCOUNTS.** — A court of equity, in settling partnership accounts and converting the partnership assets, real or personal, into money, and dividing them among the partners, never inquires into the source of the title to such assets, or in whose name they are held. *Bates v. Babcock*, 133.

See **CONTRACTS**, 25, 26; **INSURANCE**, 4; **MECHANIC'S LIEN**, 4.

PAYMENT.

See **ASSIGNMENTS**; **ASSOCIATIONS**, 2; **CHAMPERTY**; **CHATTEL MORTGAGES**, 6; **CONTRACTS**, 6; **CORPORATIONS**, 1, 12, 13; **EVIDENCE**, 10, 11; **FRAUDULENT CONVEYANCES**, 5, 6; **LIMITATIONS OF ACTIONS**, 9; **NEGOTIABLE INSTRUMENTS**, 10; **NOTARIES PUBLIC**; **TRUSTS**, 8-11; **VENDOR AND PURCHASER**, 1.

PENDENTE LITE

See **ACTIONS**, 1.

PERSONAL PROPERTY.

See **CORPORATIONS**, 15; **FRAUDULENT CONVEYANCES**, 2, 10, 11; **HUSBAND AND WIFE**, 3; **JUDICIAL SALES**, 3; **PARTNERSHIP**, 2; **TROVER**.

PLEADING.

1. **AVERMENT OF COMPLAINT, HOW CONSTRUED.** — The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. *Bates v. Babcock*, 133.
2. **FRAUD UPON CREDITORS.** — If a sheriff, sued for converting chattels, justifies as such sheriff under a judgment and execution against H., and avers that the property alleged to have been converted was the prop-

erty of H., and liable to seizure and sale under the execution against him, these averments are sufficient to allow the defendant to introduce evidence tending to prove that the transfer from H., under which the plaintiff claimed title, was fraudulent and void as against H.'s creditors. *Welcome v. Mitchell*, 912.

2. **DEMURRER DEEMED WAIVED WHEN.** — Where a general demurrer has not been acted upon by the court nor called to its attention, it should be deemed to have been waived. *Mayor v. Houston etc. R'y Co.*, 679.

4. **RES JUDICATA.** — The party relying upon a former adjudication as a defense must aver the particular court in which the judgment was rendered, and that the recovery was upon the same subject-matter and substantially between the same parties as the suit in which the defense of *res judicata* is made, and that the judgment is in full force; but a failure to aver the date when such judgment was rendered will not vitiate an answer. *Thomas v. Thomas*, 483.

See **APPEAL**, 7, 8; **CONTRACTS**, 16-18, 20; **CORPORATIONS**, 6, 14; **DAMAGES**, 14; **EQUITY**, 2, 5, 7; **ESTOPPEL**, 4; **EVIDENCE**, 9; **EXECUTION**, 7; **FRAUD**; **INJUNCTION**, 2, 8, 13; **INSURANCE**, 12; **JUDGMENTS**, 9, 18; **LIBEL**, 2; **MARRIAGE AND DIVORCE**, 3; **PARENT AND CHILD**, 4; **PARTNERSHIP**, 3; **VENDOR AND PURCHASER**, 1, 2.

PLEDGE.

See **CORPORATIONS**, 1.

POSSESSION.

See **CONTRACTS**, 11; **FRAUDULENT CONVEYANCES**, 10, 11; **SPECIFIC PERFORMANCE**, 1.

POWER OF SALE.

See **EQUITY**, 4.

PREFERENCES.

See **INSOLVENCY**, 2.

PRESENTMENT.

See **NEGOTIABLE INSTRUMENTS**, 10.

PRESUMPTION.

See **AGENCY**, 7; **ALTERATION OF INSTRUMENTS**; **APPEAL**, 4; **DENDA**, 4; **FRAUDULENT CONVEYANCES**, 12; **INSANE PERSONS**, 1; **INSURANCE**, 10; **JUDGMENTS**, 3; **LIMITATIONS OF ACTIONS**, 9; **TRIAL**, 2.

PRINCIPAL AND AGENT.

See **AGENCY**.

PRIVITY.

See **JUDGMENTS**, 4.

PROBATE COURTS.

See **JUDGMENTS**, 22.

PROCESS.

1. SERVICE OF, UPON FOREIGN CORPORATION CANNOT BE MADE UPON CLERK IN ITS STORE. — A person employed by a foreign mining corporation in the capacity of a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the California Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in the mine from *data* furnished him by the superintendent, and to pay them. The word "cashier," in that section, refers to an executive officer of the corporation, — as the cashier of a bank, — and not to a simple employee, who is not a managing agent. *Blanc v. Paymaster Mining Co.*, 149.
 2. PUBLICATION, WHEN AUTHORIZED. — AN AFFIDAVIT FOR PUBLICATION of summons which recites that the action is brought to foreclose a mortgage on real estate in a certain county, that the defendant is a non-resident of and absent from the state, and cannot be served with summons therein, is sufficient to authorize service by publication. *Taylor v. Coots*, 426.
 3. SERVICE BY PUBLICATION MAY BE PROVED by the affidavit of the book-keeper of the newspaper company publishing it, or by the affidavit of any other person having actual knowledge of the facts, and such proof is sufficient on collateral attack. *Taylor v. Coots*, 426.
 4. PUBLICATION. — Service of summons upon a non-resident defendant by publication for one week longer than is required by statute, and in the mode prescribed thereby, is sufficient. *Taylor v. Coots*, 426.
- See ATTACHMENT, 2, 3; JUDGMENTS, 16, 17, 19, 27; JURISDICTION.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROOFS OF LOSS.

See INSURANCE, 11, 14, 15.

PROPERTY RIGHTS.

See CORPORATIONS, 5.

PROTEST.

See DAMAGES, 11; LABEL, 1; NEGOTIABLE INSTRUMENTS, 10, 11; NOTARIES PUBLIC.

PUBLICATION.

See JUDGMENTS, 17, 19; JURISDICTION, 3-6; PROCESS, 2-4.

PUBLIC LANDS.

See TAXES, 1.

PUBLIC POLICY.

See CHAMPERTY; CONTRACTS, 22, 23.

RAILROADS.

1. **COMMON CARRIERS.** — A RAILWAY CORPORATION RECEIVING CARS FROM A CONNECTING LINE of road for transportation over its line becomes, in the absence of a special contract, a common carrier of the cars, as well as of the freight therein. *Peoria etc. R'y Co. v. United States Rolling Stock Co.*, 348.
2. **COMMON CARRIER, SUSPENSION OF LIABILITY OF.** — If a railway corporation receives cars to be delivered to the consignees of the freight therein, to be by the latter unloaded, after which the cars are again to be taken possession of and transported to a storage-yard, such cars, while being unloaded by the consignees, are not in possession of the railway corporation, and the liability of the latter as a common carrier is suspended, and it is not therefore liable for the loss of the cars by fire, without its fault, while in possession of the consignees. *Peoria etc. R'y Co. v. United States Rolling Stock Co.*, 348.
3. **PURCHASE OF TICKET BEFORE ENTERING TRAIN** is not necessary to constitute a person a passenger. *Norfolk etc. R. R. Co. v. Groseclose*, 718.
4. **DUTY TO PASSENGERS.** — A common carrier of passengers by rail is bound to treat them properly and carry them safely, though not as an insurer, and must protect them against injury from the negligence or willful misconduct of its servants while performing the contract to carry, and from the negligence or willful wrong of their fellow-passengers or strangers, so far as practicable. *Gillingham v. Ohio etc. R. R. Co.*, 827.
5. **CARE DUE TO PASSENGERS.** — Railroad companies, as to their passengers, are bound to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under like circumstances. *Louisville etc. R. R. Co. v. Minogue*, 378.
6. **DUTY TO HOLD TRAIN FOR ONE ASSISTING PASSENGER.** — Where one enters a railway train merely to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, upon its implied invitation, and with knowledge of his purpose, it is bound to hold the train a reasonable time to enable him to render such service and to leave the car. *Little Rock etc. R'y Co. v. Lawton*, 48.
7. **DUTY TO HOLD TRAIN FOR PARTY ASSISTING PASSENGER — NOTICE.** — One who enters a railway train merely as an escort, and to render necessary assistance to a passenger, without notice to or the knowledge of the train-men as to his purpose, cannot recover for injury sustained in leaving the train, by reason of a failure to hold it a reasonable time to enable him to accomplish his purpose and to leave the train. *Little Rock etc. R'y Co. v. Lawton*, 48.
8. **DUTY AND LIABILITY TO ESCORT OF PASSENGER.** — A person who enters a railway car merely as the necessary escort to a passenger, with the knowledge of the train-men, enters upon an implied invitation, which entitles him to ordinary care from the carrier, and to recover for any injury caused by its omission; but he cannot recover unless he proves that the injury was caused by the negligence of the carrier. *Little Rock etc. R'y Co. v. Lawton*, 48.
9. **RIGHT OF ESCORT TO ENTER CARS.** — Where the railway employees upon a train offer all necessary assistance to a passenger, his escort has no right to enter the cars merely as an escort, and the carrier owes the latter no duty, except to refrain from willful or wanton injury to him. *Little Rock etc. R'y Co. v. Lawton*, 48.

10. **REGULATIONS — NOTICE TO TRESPASSERS.** — A notice that all persons not having business with a railway company are positively forbidden to enter any of its cars does not apply to a person who attends a passenger to render necessary assistance. *Little Rock etc. R'y Co. v. Lawton*, 48.
11. **LIABILITY FOR WILLFUL ACT OF EMPLOYEE — EXPULSION OF TRESPASSER.** — A railroad company is liable for the willful wrong of its employee in expelling a trespasser from its freight train while in motion, to his injury, only upon clear proof that the act was done by such employee in the course of his employment and within the scope of his authority. *Bess v. Chesapeake etc. R. R. Co.*, 820.
12. **FALSE IMPRISONMENT OF PASSENGER.** — A common carrier of passengers by rail is liable in exemplary damages for the arrest and false imprisonment of a passenger, without reasonable or probable cause, made, or caused to be made, by its conductor in charge of the train during the execution of the contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself. *Gillingham v. Ohio etc. R. R. Co.*, 827.
13. **NEGLIGENCE. — ONE WHO ATTEMPTS TO RESCUE A PERSON PLACED IN A POSITION OF IMMEDIATE AND DEADLY PERIL** through the negligence of a railway company, and who is himself injured in such attempt, may recover of such corporation for the injury so suffered, if, when considered in connection with the emergency under which he was called to act, and the confusion attending it, the jury is of the opinion that his conduct was not negligent. *Pennsylvania Co. v. Langendorf*, 553.
14. **INJURY TO EMPLOYEE — EVIDENCE OF CONTRIBUTORY NEGLIGENCE.** — When a railroad employee engaged in the company's yard is struck and killed by a switch-engine, alleged to have been running at an unlawful rate of speed at the time of the accident, evidence that it was the universal custom in that yard to run switch-engines faster than the lawful rate of speed, and that the deceased well knew it, is admissible on the question of his contributory negligence, in an action against the company to recover for the injury. *Abbot v. McCadden*, 910.
15. **RECEIVER — RAILWAY IN HANDS OF, LIABLE FOR INJURY TO EMPLOYEE.** — A railway company is liable for damages for personal injuries inflicted upon an employee, by reason of negligence, while the road was in the hands of a receiver, where the road has been returned to the company, improved by the expenditures made by the receiver. *Texas etc. R'y Co. v. Brick*, 675.
16. **MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF RAILROADS THEREIN.** — The right given to a railroad corporation by a municipality to lay down and use tracks in one of its streets is subject to the general right of the public to use the same street. The privilege conferred upon the corporation is not exclusive, but must be shared in common with the general public. *Chicago etc. R. R. Co. v. Quincy*, 334.
17. **VESTED RIGHT, GRANT OF FRANCHISE FOR STREET-RAILWAY BOOMER, WHEN.** — When the grant to a company of a street-railway franchise has been duly accepted and acted upon by the company, it becomes a vested right or perfected contract which cannot be subsequently repealed or impaired by the body or authorities that made it, provided there is no constitutional prohibition to the granting of such special privileges by the legislature or under its authority. *Mayor v. Houston etc. R'y Co.*, 672.

- 18. GRANT OF FRANCHISE TO STREET-RAILWAY COMPANY NOT EXCLUSIVE.** — A grant by a city to a street-railway company of a right to construct and maintain a street-railway along and upon its streets does not confer an exclusive privilege, nor prevent the city from extending similar privileges to other railway companies. Subject to the right of the railway company to an easement in the streets to the extent to which the streets are occupied for that purpose by its tracks, switches, and turnouts, the city's dominion over the streets remains unchanged and unimpaired, and is as full and complete for all purposes as it was before the grant was made. Such a grant is not, therefore, void on the ground that it confers an exclusive privilege. *Mayor v. Houston etc. Ry Co.*, 672.

See CARRIERS, 2; CONSTITUTIONS; EXECUTION, 4; INJUNCTION, 4; INTERSTATE COMMERCE, 3; MUNICIPAL CORPORATIONS, 10, 12-14, 16; NEGLIGENCE, 2, 3, 5, 8; NEW TRIAL, 3.

RAPE.

See MARRIAGE AND DIVORCE, 3.

RATIFICATION.

See MUNICIPAL CORPORATIONS, 31.

REAL PROPERTY.

1. **LATERAL SUPPORT — RIGHT TO, MAY BE ASSERTED AGAINST MUNICIPALITY.** — The right of an adjoining private owner to lateral support may be asserted against a municipality making excavations in altering the grade of a street as well as against a private individual. *Stearns v. Richmond*, 758.
 2. **LATERAL SUPPORT — DAMAGES FOR REMOVAL OF.** — Every land-owner is entitled to lateral support for his soil as against the adjoining soil, whether it is owned by the public or a private person, and may recover damages directly resulting from the removal of such support. *Stearns v. Richmond*, 758.
- See ADVERSE POSSESSION, 6; CONTRACTS, 4, 7, 11, 25, 26; CUSTOM, 2; EVIDENCE, 10, 11; FRAUDULENT CONVEYANCES, 9; JUDICIAL SALES, 5; LANDLORD AND TENANT, 4; LIMITATIONS OF ACTIONS, 4; MINES; PARTNERSHIP, 2; SPECIFIC PERFORMANCE, 1-3, TRUSTS, 10.

REALTY.

See REAL PROPERTY.

RECEIVERS.

See EXECUTION, 4; RAILROADS, 15.

RECONVENTION.

See JUDGMENTS, 15.

RECORD.

See ASSOCIATIONS, 2; CORPORATIONS, 2; ESTOPPEL, 3; EVIDENCE, 10; FRAUDULENT CONVEYANCES, 9; JUDGMENT, 1, 2; MARRIAGE AND DIVORCE, 3; TRIAL, 4.

REDEMPTION.**See JUDICIAL SALES, 4.****REFORMATION.****See MISTAKE, 2.****RELEASE.****See CHATTEL MORTGAGES, 2; JURISDICTION, 4; NEGOTIABLE INSTRUMENTS, 2.****REMAINDERS.****See ESTATES, 2-4; HUSBAND AND WIFE, 1.****RENTS.****See EXECUTORS AND ADMINISTRATORS, 3; JUDICIAL SALES, 1; LANDLORD AND TENANT, 2-4.****REPRESENTATIONS.****See ASSIGNMENT, 1; INSURANCE, 6.****RESCISSION.****See VENDOR AND PURCHASER, 1, 2.****RES GESTÆ.****See EVIDENCE, 5; HOMICIDE, 6.****RES JUDICATA.****See JUDGMENTS, 15; PLEADING, 4.****RESTRAINT OF TRADE.****See CONTRACTS, 21-24.****RESTRICTIONS.****See EVIDENCE, 4.****RETROACTIVE.****See ASSOCIATIONS, 5.****REVIVOR.****See LIMITATIONS OF ACTIONS, 6.****REVOCATION.****See EQUITY, 4.****RIPARIAN RIGHTS.****See WATERCOURSES.****SALES.****See CHATTEL MORTGAGES, 3-5; CONTRACTS, 16; DAMAGES, 1-3; EXECUTORS AND ADMINISTRATORS, 1; FRAUD, 1; SPECIFIC PERFORMANCE, 2; TRADE-MARKS; TRUSTS, 4; VENDOR AND PURCHASER.**

SEARCHER OF RECORDS.

See LIMITATIONS OF ACTIONS, 2, 4

SELF-DEFENSE.

See HOMICIDE, 4, 9, 10, 17.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 3, 4

SEQUESTRATION.

See EXECUTION, 4

SERVANTS.

See MASTER AND SERVANTS.

SERVICES.

See DAMAGES, 8, 9.

SETTLEMENTS.

See ASSIGNMENT.

SEWERS.

See MUNICIPAL CORPORATIONS, 19, 22, 24.

SHERIFFS.

See DAMAGES, 10; JUDICIAL SALES, 3, 4; PLEADINGS, 1.

SLANDER.

See LIBEL.

SPECIFIC PERFORMANCE.

- 1. STATUTE OF FRAUDS — PART PERFORMANCE. —** Possession is an act of part performance as to both parties to an agreement relating to real property, and entitles both to relief by the specific performance of such agreement. *Cutler v. Babcock*, 882.
- 2. SPECIFIC PERFORMANCE OF AN AGREEMENT, ENTERED INTO BY THE PURCHASERS** of different parcels of real property, not to use it for the sale of intoxicating liquors, will be enforced against one of them, though some of the purchasers have sold their lots to grantees who are not bound by the agreement, if none of such grantees have in fact violated it. *Hall v. Solomon*, 218.
- 3. PAROL AGREEMENT CONCERNING PURCHASE OF LAND. —** A parol agreement between two, that land is to be purchased by one for the joint benefit of both, cannot be specifically enforced by one of them, who fails to clearly prove that he has complied, or offered to comply, with the conditions of the contract. *Robbins v. Kimball*, 45.
- 4. STATUTE OF FRAUDS — JUDICIAL SALE — AGREEMENT TO PURCHASE FOR AND CONVEY TO DEFENDANT. —** If an oral agreement is made between a mortgagor and a mortgagee, that for the purpose of clearing the title to the property mortgaged the mortgage shall be foreclosed and the premises purchased by the mortgagee, and that certain portions shall be by

him conveyed to the grantee of the mortgagor and the residue to the mortgagor himself, and pursuant to the agreement a foreclosure is had and a sale thereunder made to the mortgagee, who conveys to the grantee of the mortgagor as agreed, and also permits the mortgagor to remain in possession of the other parcels for many years, but refuses to convey on demand to the mortgagor, the latter is entitled to a decree requiring such conveyance to be made. Such mortgagee is, under the circumstances, a trustee *ex maleficio*, whom equity will compel to perform his trusts. *Cutler v. Babcock*, 882.

5. **STATUTE OF FRAUDS. — A PAROL AGREEMENT BETWEEN A MOTHER AND A CHILDLESS COUPLE**, to the effect that if she will give them her infant, and surrender all right to its custody, and forever conceal from it the fact of her motherhood, they will adopt and keep such infant as their child and heir, and that at their death it shall succeed to all their property, will not be specifically enforced in equity, though the mother surrendered her child as stipulated, and it was received by the couple and raised as their child and given their name and resided with them until married with their consent, the child on its part performing all the duties usually performed by an affectionate child for and towards its parents. These various acts cannot be regarded as a part performance of the contract sufficient to take it out of the statute of frauds, because they are not necessarily referable to it, but are acts such as may have been prompted merely by benevolence and affection. *Shaban v. Swan*, 517.

See AGENCY, 3; CONTRACTS, 4, 9.

STATES.

See DEDICATION; EMINENT DOMAIN, 9; EVIDENCE, 10, 11; INTERSTATE COMMERCE; JURISDICTION, 4; MUNICIPAL CORPORATIONS, 1, 7; STATUTES, 1.

STATUTE OF FRAUDS.

See CONTRACTS, 4-11, 25, 26; DEEDS, 3; FRAUDULENT CONVEYANCES, 10; PARTNERSHIP, 4; SPECIFIC PERFORMANCE, 5; TRUSTS, 1.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **CONSTITUTIONAL LAW — FERRY FRANCHISE — VESTED RIGHTS IN.** — The grant of a ferry franchise creates a vested property right, alienable and descendible, of which the state has no power by statute retroactive in its operation to divest the grantee or his vendee, or prevent the full enjoyment of it by either, for the sole cause that he is a non-resident of the state. *Dufour v. Stacey*, 374.
2. **INTOXICATING LIQUORS — CONSTRUCTION OF STATUTE FORBIDDING MANUFACTURE OF.** — A statute prohibiting the manufacture for sale or sale of intoxicating liquors within the state, except for certain purposes, and then only by persons holding permits, includes the manufacture and sale of beer in that state by a person not having a permit, although it is manufactured and sold there for the sole purpose of being transported to another state. *Tredway v. Riley*, 447.

2. INTERSTATE COMMERCE, LIQUOR LAW, WHEN NOT REGULATION OF. — A statute prohibiting the manufacture for sale or sale of intoxicating liquor within the state, except for certain purposes, by persons holding a permit, includes the manufacture and sale of beer within the state by a person not holding a permit, although it is manufactured and sold solely for the purpose of transportation to another state; and such statute is not void as an attempt to regulate interstate commerce. *Tredway v. Riley*, 447.

See ATTACHMENT, 4; CHATTEL MORTGAGES, 3, 4; CONTRACTS, 12; CORPORATIONS, 12, 13; DEBTOR AND CREDITOR, 2; ESTATES, 3; EXECUTION, 4-6; FRAUDULENT CONVEYANCES, 10; HOMICIDE, 16; INSOLVENCY, 2; INTERSTATE COMMERCE, 3; JUDGMENTS, 26; JURISDICTION, 5, 6; LIMITATIONS OF ACTIONS, 1; MECHANIC'S LIEN, 1, 3; MUNICIPAL CORPORATIONS, 20; NEGOTIABLE INSTRUMENTS, 10; NUISANCE, 2; OFFICERS, 2, 3; PROCESS, 1, 4; TELEPHONE COMPANIES.

STEAMSHIP COMPANIES.

See CORPORATIONS, 7.

STOCK.

See ATTACHMENT, 4; CORPORATIONS; EXECUTION, 2, 3; FRAUDULENT CONVEYANCES, 5, 9; JUDGMENTS, 9, 10.

STREETS.

See ADVERSE POSSESSION, 6; AGENCY, 8; APPEAL, 8; DEDICATION; EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS, 10-22; NUISANCE, 1; RAILROADS, 16-18; REAL PROPERTY, 1; TELEPHONE COMPANIES.

SUBROGATION.

See JUDICIAL SALES, 1, 2.

SUICIDE.

See INSANE PERSONS.

SUMMONS.

See PROCESS.

SUNDAY.

See INTERSTATE COMMERCE, 3; NEGOTIABLE INSTRUMENTS, 10, 11.

SURETYSHIP.

See CHATTEL MORTGAGES, 2; GUARANTY.

SURPLUSAGE.

See CONTRACTS, 13.

TAXES.

1. PUBLIC LANDS. — After a final homestead certificate to public lands has been issued, entitling the holder to a patent, the lands are subject to state taxation, although the patent has not yet issued. *Burcham v. Terry*, 42.

2. **TAX DEED — DESCRIPTION.** — A tax deed to part of a tract of land sold for taxes due upon the whole, which indicates the corner of the legal subdivision from which the part sold was taken, and the number of acres in the part, is sufficient as to description. *Cocks v. Simmons*, 28.
 3. **TAX SALE — VALIDITY.** — Where different sections of land, severally assessed, are sold in a body for the sum of the taxes due upon all, the sale and tax deed thereunder are absolutely void. *Cocks v. Simmons*, 28.
 4. **EXEMPTION FROM, FOR PUBLIC SERVICES.** — An exemption from taxation in consideration of public services, to be constitutional, must be made in consideration of services rendered or to be thereafter rendered, and they must be expressed in the act making the exemption, or in the act to which that act is an amendment. *Commonwealth v. Makibben*, 382.
 5. **EXEMPTION — PROPERTY OF MUNICIPAL CORPORATION.** — The property of a municipal corporation not necessary to the exercise of its municipal governmental functions must be treated as private property which cannot be exempted from state taxation except in consideration of public services. *Commonwealth v. Makibben*, 382.
 6. **EXEMPTIONS. — WATER-WORKS OF MUNICIPAL CORPORATION,** constructed and operated for the convenience and profit of its citizens, and not necessary to the exercise of its municipal governmental functions; cannot be exempted from state taxation. *Commonwealth v. Makibben*, 382.
- See ADVERSE POSSESSION, 3, 4; CO-TENANCY; EQUITY, 1; EXECUTORS AND ADMINISTRATORS, 3; JUDGMENTS, 13; LEGISLATURE, 1; MUNICIPAL CORPORATIONS, 2-4, 7-9.

TELEPHONE COMPANIES.

MUNICIPAL CORPORATIONS — STREETS, RIGHTS OF TELEPHONE CORPORATIONS THEREIN. — A statutory grant to a corporation of a right to construct telephone lines along and upon a public highway confers the privilege subject to the duty on the part of the corporation of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. *Cincinnati etc. Ry Co. v. Telegraph Ass'n*, 559.

See MUNICIPAL CORPORATIONS, 10.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See VENDOR AND PURCHASER, 1, 2.

THREATS.

See HOMICIDE, 4-7.

TORTS.

See LIMITATIONS OF ACTIONS, 1.

TRADE.

See CONTRACTS, 21-24.

TRADE-MARKS.

SALES. — A TRADE-MARK affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment. *Dant v. Head*, 369.

See **CONTRACTS**, 6; **FRAUD**, 1.

TRESPASS.

See **EMINENT DOMAIN**, 4; **INJUNCTION**, 1, 2; **RAILROADS**, 10, 11.

TRIAL.

1. **JURY TRIAL IN CIVIL CASE PROPERLY REFUSED WHEN.** — When a suit is brought in May, the defendant answers in the following October, demands a jury at the next April term, but not until the jury docket for the term has been disposed of and the jury been presumably discharged, it is not error for the trial court to refuse to place the cause on the jury docket and allow it to be tried by a jury. *Petri v. First Nat. Bank*, 657.
2. **INVASION OF PROVINCE OF JURY.** — Remarks made by the court, in the trial of a case, as to the credibility of a witness, or as to the weight of any evidence relevant to the issue, however inadvertently they may have been made, are an improper infringement upon the province of the jury, and, when duly excepted to, are grounds for assigning error by the party prejudiced. The court may pass upon the admissibility of evidence, but, when admitted, its credibility and weight are questions for the jury. *Garner v. State*, 231.
3. **CRIMINAL LAW — RECORD OF OATH ADMINISTERED TO JURY — SUFFICIENCY OF.** — Where the record in a criminal case purports to recite the oath as it was in fact administered to the jury, and such oath appears to be substantially different from that prescribed by law, the verdict must be set aside and the judgment reversed; but when the record does not so purport, but merely imports that the jurors were in fact sworn, without negating the presumption that they were duly sworn, the entry is sufficient, and in better form than if the prescribed oath were recited word for word. *Garner v. State*, 231.
4. **CRIMINAL LAW — SUFFICIENCY OF RECORD OF OATH ADMINISTERED TO JURY.** — When the record entry in a criminal case merely recites that the jury was "duly sworn" to try the issue, it only purports to state, and is intended to state merely, that the jury was sworn according to the formula prescribed by law for all similar cases, and it is sufficient without reciting such formula in full. *Garner v. State*, 231.
5. **EVIDENCE — THE ORDER IN WHICH EVIDENCE SHALL BE INTRODUCED** may be determined by the trial court, in the exercise of a sound discretion, and the fact that parol evidence of the terms of an alleged contract was received before evidence was offered showing acts of part performance does not entitle the losing party to a new trial or a reversal of the judgment, if evidence of such performance is afterwards offered and received. *Shahan v. Swan*, 517.
6. **WITNESSES IN CRIMINAL CASES — DUTY OF PROSECUTION TO CALL.** — The prosecution is not bound to call every witness present at the transaction which is the subject of the indictment. *Hill v. Commonwealth*, 744.
7. **WITNESSES IN CRIMINAL CASES — RULE FOR CALLING.** — In criminal trials it is within the discretion of the prosecution to say what witnesses it will call; but if any material witness is not called by it, the defense

2. **TAX DEED — DESCRIPTION.** — A tax deed to part of a tract of land sold for taxes due upon the whole, which indicates the corner of the legal subdivision from which the part sold was taken, and the number of acres in the part, is sufficient as to description. *Cocks v. Simmons*, 28.
 3. **TAX SALE — VALIDITY.** — Where different sections of land, severally assessed, are sold in a body for the sum of the taxes due upon all, the sale and tax deed thereunder are absolutely void. *Cocks v. Simmons*, 28.
 4. **EXEMPTION FROM, FOR PUBLIC SERVICES.** — An exemption from taxation in consideration of public services, to be constitutional, must be made in consideration of services rendered or to be thereafter rendered, and they must be expressed in the act making the exemption, or in the act to which that act is an amendment. *Commonwealth v. Makibben*, 382.
 5. **EXEMPTION — PROPERTY OF MUNICIPAL CORPORATION.** — The property of a municipal corporation not necessary to the exercise of its municipal governmental functions must be treated as private property which cannot be exempted from state taxation except in consideration of public services. *Commonwealth v. Makibben*, 382.
 6. **EXEMPTIONS. — WATER-WORKS OF MUNICIPAL CORPORATION,** constructed and operated for the convenience and profit of its citizens, and not necessary to the exercise of its municipal governmental functions; cannot be exempted from state taxation. *Commonwealth v. Makibben*, 382.
- See **ADVERSE POSSESSION**, 3, 4; **CO-TENANCY**; **EQUITY**, 1; **EXECUTORS AND ADMINISTRATORS**, 3; **JUDGMENTS**, 13; **LEGISLATURE**, 1; **MUNICIPAL CORPORATIONS**, 2-4, 7-9.

TELEPHONE COMPANIES.

MUNICIPAL CORPORATIONS — STREETS, RIGHTS OF TELEPHONE CORPORATIONS THEREIN. — A statutory grant to a corporation of a right to construct telephone lines along and upon a public highway confers the privilege subject to the duty on the part of the corporation of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. *Cincinnati etc. Ry Co. v. Telegraph Ass'n*, 559.

See **MUNICIPAL CORPORATIONS**, 10.

TENANTS IN COMMON.

See **CO-TENANCY**.

TENDER.

See **VENDOR AND PURCHASER**, 1, 2.

THREATS.

See **HOMICIDE**, 4-7.

TORTS.

See **LIMITATIONS OF ACTIONS**, 1.

TRADE.

See **CONTRACTS**, 21-24.

TRADE-MARKS.

SALES. — A TRADE-MARK affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment. *Dant v. Head*, 369.

See **CONTRACTS**, 6; **FRAUD**, 1.

TRESPASS.

See **EMINENT DOMAIN**, 4; **INJUNCTION**, 1, 2; **RAILROADS**, 10, 11.

TRIAL.

1. **JURY TRIAL IN CIVIL CASE PROPERLY REFUSED WHEN.** — When a suit is brought in May, the defendant answers in the following October, demands a jury at the next April term, but not until the jury docket for the term has been disposed of and the jury been presumably discharged, it is not error for the trial court to refuse to place the cause on the jury docket and allow it to be tried by a jury. *Petri v. First Nat. Bank*, 657.
2. **INVASION OF PROVINCE OF JURY.** — Remarks made by the court, in the trial of a case, as to the credibility of a witness, or as to the weight of any evidence relevant to the issue, however inadvertently they may have been made, are an improper infringement upon the province of the jury, and, when duly excepted to, are grounds for assigning error by the party prejudiced. The court may pass upon the admissibility of evidence, but, when admitted, its credibility and weight are questions for the jury. *Garner v. State*, 231.
3. **CRIMINAL LAW — RECORD OF OATH ADMINISTERED TO JURY — SUFFICIENCY OF.** — Where the record in a criminal case purports to recite the oath as it was in fact administered to the jury, and such oath appears to be substantially different from that prescribed by law, the verdict must be set aside and the judgment reversed; but when the record does not so purport, but merely imports that the jurors were in fact sworn, without negating the presumption that they were duly sworn, the entry is sufficient, and in better form than if the prescribed oath were recited word for word. *Garner v. State*, 231.
4. **CRIMINAL LAW — SUFFICIENCY OF RECORD OF OATH ADMINISTERED TO JURY.** — When the record entry in a criminal case merely recites that the jury was "duly sworn" to try the issue, it only purports to state, and is intended to state merely, that the jury was sworn according to the formula prescribed by law for all similar cases, and it is sufficient without reciting such formula in full. *Garner v. State*, 231.
5. **EVIDENCE — THE ORDER IN WHICH EVIDENCE SHALL BE INTRODUCED** may be determined by the trial court, in the exercise of a sound discretion, and the fact that parol evidence of the terms of an alleged contract was received before evidence was offered showing acts of part performance does not entitle the losing party to a new trial or a reversal of the judgment, if evidence of such performance is afterwards offered and received. *Shahan v. Swan*, 517.
6. **WITNESSES IN CRIMINAL CASES — DUTY OF PROSECUTION TO CALL.** — The prosecution is not bound to call every witness present at the transaction which is the subject of the indictment. *Hill v. Commonwealth*, 744.
7. **WITNESSES IN CRIMINAL CASES — RULE FOR CALLING.** — In criminal trials it is within the discretion of the prosecution to say what witnesses it will call; but if any material witness is not called by it, the defense

may call him and compel his attendance, and it is within the discretion of the trial court to call any witness present at the transaction, or whose name is on the indictment, not called by the prosecution, and when so called, the witness may be examined and cross-examined by both sides. *Hill v. Commonwealth*, 744.

8. **INSTRUCTIONS TO JURY ON ABSTRACT PROPOSITIONS OF LAW IMPROPER.** — It is not proper to instruct the jury upon abstract propositions of law, however correct in themselves they may be. *Bowen v. Clarke*, 625.
9. **INSTRUCTIONS, WHEN IRRELEVANT,** though abstractly right, need not be given. *Hill v. Commonwealth*, 744.
10. **FINDINGS IMPLIED, AND MAY BE EXCEPTED TO, WHEN.** — Where findings are waived, and no express findings are therefore found in the record, such findings on all matters of fact in issue as are necessary to support the judgment of the court in favor of the successful party are implied, and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. *Blanc v. Paymaster Mining Co.*, 149.
11. **VERDICT — INCONSISTENT FINDINGS.** — When any separate verdict or special finding is inconsistent with the general verdict, the former must control the latter, and judgment must be rendered accordingly. *Bess v. Chesapeake etc. R. R. Co.*, 820.
12. **MOTION FOR CONTINUANCE.** — Failure to assign a ruling denying a motion for a continuance as a ground on motion for a new trial is not a waiver or abandonment of an exception taken to such ruling. *Garner v. State*, 231.
13. **MOTION FOR CONTINUANCE — DISCRETION OF COURT.** — A motion for a continuance, on the ground that the counsel for the accused is too ill to properly conduct the defense, rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, in the absence of an abuse of its discretion. *Garner v. State*, 231.
14. **CONTINUANCE — APPLICATION FOR, PROPERLY DENIED, WHEN.** — When a continuance is asked for the purpose of obtaining testimony which could not avail the party asking it, its refusal works no injury, and is not error. *Herman v. Gunter*, 632.

See APPEAL, 5, 10, 11; CONTRACTS, 19; NEW TRIAL.

TROVER.

CONVERSION. — UNQUALIFIED REFUSAL TO DELIVER PERSONAL PROPERTY to one entitled to its possession, based upon an assertion of title on the part of the person so refusing, is a conversion thereof, though at the time a delivery, owing to the situation of the property, was impossible. *Hartford Ice Co. v. Greenwoods Co.*, 189.

TRUSTS.

1. **RESULTING.** — If real property is purchased and a conveyance is taken in the name of one person, while the purchase-money is paid by another, a resulting trust arises from the transaction in favor of the person thus paying the purchase price. A trust of this character does not depend upon contract and is not affected by the statute of frauds. *Champlin v. Champlin*, 823.

2. **STATUTE OF FRAUDS.** — If a grantee of property devises it to different persons, to be held in different proportions, without referring to any obligation to so dispose of it, such devise, aided by parol evidence, cannot establish a trust in favor of the devisees pursuant to an alleged parol agreement, entered into before the land was conveyed to the testator, between him and his grantor, that the land conveyed should be held by the grantee during his life, and after his death should be divided among the grantee and others, who are the same persons named as devisees in such will. *Champlin v. Champlin*, 323.
3. **STATUTE OF FRAUDS.** — WHEN A CONVEYANCE IS ABSOLUTE IN FORM, the grantor is not permitted by parol evidence to prove that the conveyance was in trust to hold the property for himself and others. *Champlin v. Champlin*, 323.
4. **TRUSTEES' AUTHORITY, WHO MAY NOT DISPUTE.** — Where persons acting as trustees of certain devisees of real property make a contract of sale on behalf of such devisees, and exact an agreement from the purchasers that no part of the property shall be used for the sale of intoxicating liquors, a purchaser who accepts such an agreement as part of the consideration of the sale to him cannot avoid it on the ground that the trustees were not authorized to make the sale or to execute the agreement. *Hall v. Solomon*, 218.
5. **TRUST DEED — INSTRUMENT CONVEYING LEGAL TITLE UPON TRUSTS DECLARED IN.** — An instrument which conveys to the grantee the legal title to property therein described upon certain trusts, which it declares, and which confers upon him the power, in execution thereof, to sell the property thus conveyed, and transmit the legal title to his grantee, is a trust deed. *More v. Calkins*, 128.
6. **TRUST DEED AS EQUITABLE MORTGAGE — PARTIES.** — Where a deed conveys land to a trustee to hold for the separate use of a married woman, reserving to her the right to sell and to unite with her husband and her trustee in conveying the land at her election, and she and her husband execute a trust deed to the land, properly acknowledged and recorded, to which the trustee is not a formal party, but which he approves by sealed writing attached thereto, the trust deed, though not sufficient to pass the legal title for want of the trustee as a formal party, is sufficient as an equitable mortgage. *Bensimer v. Fell*, 774.
7. **TRUST DEED — COMPENSATION FOR SERVICES OF TRUSTEE.** — A trustee under a trust deed is entitled, upon the close of his trust, to a reasonable compensation for his services in performing his duties as trustee under the deed, to be fixed by the court, unless the parties can agree in relation thereto, and also to be reimbursed for all expenses incurred by him. *More v. Calkins*, 128.
8. **TRUST ESTATES — WHEN SUBJECT TO DEBTS OF CESTUI QUE TRUST.** — Estates of every kind held in trust are subject to the debts of the persons for whose benefit they are held, although the instrument creating the trust may provide otherwise, unless the trustee is given a discretionary power to withhold all payment or benefit from the cestui que trust. *Bland v. Bland*, 390.
9. **TRUST ESTATES UNDER WILL — WHEN SUBJECT TO DEBT OF CESTUI QUE TRUST.** — When a will creating a trust estate provides for the payment of the profits thereof to the cestui que trust, unless his creditor shall attempt to subject them to the payment of his debt, in which event such profits shall be added to the principal, which the cestui que trust shall

have absolute power to dispose of by will, the beneficiary under the trust takes such an interest in the property as may be subjected to the payment of his debts. *Bland v. Bland*, 390.

10. TRUST ESTATE — HOW SUBJECTED TO PAYMENT OF BENEFICIARY'S DEBTS. — Where a will creates a trust estate, and gives the beneficiary the profits thereof, with power to dispose of the estate by will, and his creditor undertakes to subject the trust to the payment of a debt, the personalty should first be applied to its payment, and, if need be, rent out the realty for this purpose. If this will not satisfy the debt within a reasonable time, a sale of so much of the realty as may be necessary will be ordered. *Bland v. Bland*, 390.

11. TRUST ESTATES — WHEN SUBJECT TO DEBTS OF BENEFICIARY. — A trust estate, or the profits thereof, created by will or otherwise, is subject to the debts of the beneficiary, unless the instrument creating the trust divests him of all interest in the property upon an attempt by his creditors to subject it to his debts. *Bland v. Bland*, 390.

See APPEAL, 2; CORPORATIONS; FRAUDULENT CONVEYANCES, 8; JUDGMENTS, 5; MORTGAGES; MUNICIPAL CORPORATIONS, 15; PARTNERSHIP, 3, 5; SPECIFIC PERFORMANCE, 4.

TRUST DEEDS.

See EQUITY, 4; JUDGMENTS, 5; TRUSTS, 5-7.

ULTRA VIRES.

See JUDGMENTS, 10.

USAGE.

See CUSTOM.

USURY.

See INTEREST; JUDGMENTS, 14, 24.

VACANT AND UNOCCUPIED.

See INSURANCE, 7-10.

VENDOR AND PURCHASER.

1. COMPLAINT IN ACTION TO RECOVER PURCHASE-MONEY PAID INSUFFICIENT WHEN. — A complaint in an action to recover money paid upon a contract for the purchase of land which alleges that by the terms of the contract the amount sued for was to be paid down and the remainder of the price in two equal installments, and that the vendor was, upon the payment of the last installment, to execute and deliver a deed of the land, that time was, by express terms, made the essence of the contract, and that at the maturity of the contract the vendors failed and refused to convey, but which does not allege payment of the deferred installments, nor any tender or offer to pay either of them, nor any demand for a deed, nor any inability to convey, nor any rescission of the contract, does not state a cause of action. *Townsend v. Tufts*, 107.
2. TENDER OF PURCHASE-MONEY DUE AND DEMAND FOR DEED ESSENTIAL TO RECOVERY OF PURCHASE-MONEY PAID. — The mere neglect of both parties to a contract for the purchase of land, by which it is agreed that a portion of the purchase-money should be paid down and the remainder

in two equal annual installments, upon the payment of the last of which the vendor was to convey the land, to perform the contract on the day fixed for its performance, cannot, without anything more, operate as a rescission of the contract; and when the complaint in an action to recover the amount paid down on the contract shows a first breach of the contract by the purchaser, by his failure to pay the first deferred payment, a full year before the vendors were required to convey, a tender by the purchaser of the remainder of the purchase-money due and a demand for a deed are essential to a recovery in such action, and it is not enough to allege a refusal of the vendors to execute and tender a deed at the time fixed for the conveyance. *Townsend v. Tufts*, 107.

3. LIEN FOR PURCHASE-MONEY. — When a purchase-money bond is secured by a lien retained in the deed of the land, the execution of a new bond will not release the lien. *Hull v. Hull*, 800.

See AGENCY, 3; CONTRACTS, 7; DEEDS, 3; EVIDENCE, 6; JUDGMENTS, 4; SPECIFIC PERFORMANCE, 1-3; WATERCOURSES.

VENDOR'S LIEN.

See LIMITATIONS OF ACTIONS, 11; VENDOR AND PURCHASER, 2.

VENUE.

See ACTIONS, 2.

VERDICT.

See APPEAL, 4; DAMAGES, 13, 14; TRIAL.

VESTED RIGHTS.

See ASSOCIATIONS, 3; RAILROADS, 17; STATUTES, 1.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 4-6.

WAGERS.

1. A WAGER IS A CONTRACT in which the parties stipulate that they shall gain or lose on the happening of a certain event in which they have no interest except that arising from the possibility of such gain or loss. *Kitchen v. Loudenback*, 540.

2. WHAT IS NOT. — A contract by which the vendee purchases fifty bushels of seed-wheat at fifteen dollars per bushel, and the vendor agrees to sell at the same price one hundred bushels, to be grown by the vendee from such seed, less a commission of 33½ per cent, and gives a bond to secure the performance of such agreement, is not a wager, though it is not certain that the vendee will raise one hundred bushels of wheat, or if raised, that the vendor will be able to pay the price stipulated. *Kitchen v. Loudenback*, 540.

WAGES.

See CONTRACTS, 2.

WAIVER.

See CHATTEL MORTGAGES, 3; EXECUTION, 5; INSURANCE, 6, 8, 10-12, 14; LANDLORD AND TENANT, 1; MECHANIC'S LIEN, 5, 6; PLEADING, 3; TRIAL, 10, 12.

WARRANTY.

See COVENANTS; INSURANCE, 5; NEGOTIABLE INSTRUMENTS, 4.

WATERCOURSES.

1. **BOUNDARIES — OHIO RIVER AS.** — A grantee of land bounded on the Ohio River takes along the line of the river to low-water mark, in the absence of decided language in the conveyance showing a manifest intent to the contrary on the part of the grantor. *Brown Oil Co. v. Caldwell*, 793.
2. **RIPARIAN OWNERS** of land bounded by the Ohio River take to low-water mark. *Brown Oil Co. v. Caldwell*, 793.
3. **BOUNDARIES — RIVER AS.** — When a deed of land calls for a stake at the Ohio River, thence down said river to another stake at the mouth of French Creek, the grantee will take along the line of the river to low-water mark, although the deed provides that these calls are controlled by a surveyor's plat fixing the first point as just over the river bank, running thence in a straight line to the stake on the mouth of French Creek, thus leaving a narrow, inaccessible strip between it and low-water mark. *Brown Oil Co. v. Caldwell*, 793.
4. **BOUNDARIES, MEASUREMENT OF, ALONG RIVER.** — When a certain distance is called for in a deed, from a given point on a navigable stream to another point on the stream, to be ascertained by such measurement, the measurement must be made by the meanders of the stream, and not in a straight line. *Brown Oil Co. v. Caldwell*, 793.

WATER COMPANIES.

1. **WATER COMPANY'S LIABILITY TO CITIZENS. — MUNICIPAL ORDINANCE, BY WHICH A WATER COMPANY IS REQUIRED TO SUPPLY** the city and the inhabitants thereof with water for private and public uses, for private and public consumption, and for putting out fires, does not create contract relations between such company and the inhabitants of the city as individuals to supply them, and for their use, water for public purposes and consumption and for the putting out of fires. *Britton v. Green Bay etc. Water Works Co.*, 856.
2. **LIABILITY OF, FOR FAILURE TO FURNISH WATER TO PUT OUT FIRES.** — A water company which accepts an ordinance of a municipal corporation granting it the use of the public streets and grounds in which to maintain mains, hydrants, and other structures of water-works, and to charge and collect rates for furnishing water to the inhabitants of the city for private use, and which requires the company to supply water for putting out fires and for other public and private uses, does not become liable to suit by a private citizen for damages sustained by him in the destruction of his property by fire, owing to the negligence of the company in not furnishing water to its mains and hydrants in quantities sufficient to extinguish fire. *Britton v. Green Bay etc. Water Works Co.*, 856.

See DEEDS, 4.

WILLS.

1. **CONFLICT OF EVIDENCE.** — Where, upon an issue respecting the mental capacity of a testator to execute his will, there is a conflict of evidence, the appellate court will not disregard a finding of the jury, unless it is clearly against the weight of evidence. *Champlin v. Champlin*, 323.

- 2. CONTEST — COSTS.** — When there is probable cause for contesting a will, and the estate is valuable, the costs and a reasonable attorney's fee for the contestant will be taxed against the estate. *Seebrook v. Fedawa*, 488.

See DEVISE; ESTATES, 3; TRUSTS, 2, 9.

WITNESSES.

1. **HUSBAND OR WIFE IS INCOMPETENT** as a witness for or against the other to testify as to any information obtained by either during the marriage, and by reason of its existence, and the same rule prevails even after the marital relation has been dissolved by divorce, or the consent of the opposing party has been given. *Commonwealth v. Sapp*, 405.
2. **HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER.** — The "communications" to which neither husband nor wife can testify for or against the other during the marriage or after it has ceased should not be confined to a mere statement by one to the other, but should embrace all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. *Commonwealth v. Sapp*, 405.
3. **WHEN WIFE MAY TESTIFY AGAINST HUSBAND.** — A wife, either before or after divorce, is a competent witness against the husband when he is charged with having committed or attempted to commit a crime against the liberty or person of the wife during the existence of the marriage. *Commonwealth v. Sapp*, 405.
4. **DIVORCED HUSBAND OR WIFE** is competent as a witness for or against the other to testify to acts done by either during the existence of the marital relation, provided that knowledge of such acts was not obtained by reason of the existence of the marriage. *Commonwealth v. Sapp*, 405.
5. **DIVORCED WIFE, WHEN MAY TESTIFY AGAINST HUSBAND.** — Upon the trial of a husband charged with attempting to poison his wife, such wife, who is divorced at the time of the trial, may testify that during the existence of the marriage she saw her husband sprinkle a substance upon a piece of watermelon intended for her which was afterwards shown to contain arsenic. *Commonwealth v. Sapp*, 405.
6. **DIVORCED HUSBAND OR WIFE AS WITNESS.** — As to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence and relates to the transactions of the one or the other, either may testify for or against the other. *Commonwealth v. Sapp*, 405.

See APPEAL, 6; CONTRACTS, 16; EVIDENCE; TRIAL, 2, 6, 7.

WORDS AND PHRASES.

See DEFINITIONS.

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